



INSTITUTE FOR DEFENSE ANALYSES

**Issues and Alternatives for Cleanup and  
Property Transfer of Base Realignment  
and Closure (BRAC) Sites**

E. T. Morehouse, Project Leader

August 2000

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E. T. Morehouse, Project Leader  
M. C. Bracken  
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## **PREFACE**

This study was conducted by the Institute for Defense Analyses (IDA) in response to a request from the Assistant Deputy Under Secretary of Defense (Environmental Cleanup). The members of the IDA project team included Mr. Edward T. Morehouse, Dr. Marilyn C. Bracken, and Ms. Rebecca R. Rubin. The IDA Review Committee consisted of Mrs. Christine J. Crabill, Dr. Phillip Gould, Dr. Earl D. Potter, and Dr. Joel E. Tumarkin.

The project team would like to thank all the participants in this process for the time, effort, and intellect they applied to this project. Special thanks go to the private sector volunteers whose unique insights and diverse perspectives provided a comprehensive view of the BRAC process. Panel members, concept paper chairs, working group participants, and other experts in environmental remediation and property transfer devoted considerable effort to the preparation of the concept papers and contributed unselfishly of their professional skill and personal time. The project team would also like to acknowledge the cooperation and time contributed by the Services, BRAC program managers, and Local Reuse Authority Directors for their willingness to discuss the complexities and challenges they face in implementing the BRAC program. Finally, the project team would like to thank Karla Perri, Assistant Deputy Under Secretary of Defense (Environmental Cleanup) for her insight into the conceptualization of the study, and Sherri Goodman, Deputy Under Secretary of Defense (Environmental Security) and Randall Yim, Deputy Under Secretary of Defense (Installations) for their support and interest in finding ways to improve the BRAC process.

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# INTRODUCTION

## A. STATUS OF THE BRAC PROGRAM

In 1986, when defense outlays began to decline after five consecutive years of increases, attention turned to ways to reduce support costs. One approach included closing unneeded bases and installations. To remove political influences from the process, the Congress passed the Base Closure and Realignment Act (BCRA) in 1988 to recommend military bases within the United States for closure and mission realignment. The 1988 Base Closure Commission recommended closing 86 military installations and realigning 13 others. In 1990, PL 101-510 amended BCRA to establish additional independent BRAC commissions in 1991, 1993, and 1995. In the Secretary of Defense's 1995 Report to Congress, he estimated the four rounds of BRAC in 1988, 1991, 1993 and 1995 when complete would reduce base infrastructure in the US by about 21 percent and produce an estimated net present value savings over 20 years of almost \$59 billion.<sup>1</sup> More recent revised estimates indicate savings of approximately \$5.7 billion per year.<sup>2</sup>

In addition to the legislation establishing the four BRAC rounds, other major legal issues substantively affect the BRAC process.<sup>3</sup>

### 1. Community Environmental Response Facilitation Act (CERFA)

To expedite the rapid identification and return to local communities of clean BRAC properties, Congress passed the Community Environmental Response Facilitation Act (CERFA) of 1992 (PL 102-426), which amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERFA stipulates that, for U.S.

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<sup>1</sup> Department of Defense BRAC 95 Report to the Defense Base Closure and Realignment Commission (February 1995). A later study pointed out that "...most of the services and defense agencies did not update their initial estimates of BRAC savings once initial implementing budgets were developed." U.S. GAO Report to Congress entitled Military Bases: Lessons Learned From Prior Base Closure Rounds, July 1997.

<sup>2</sup> Estimate provided by the Office of Economic Adjustment, within the Office of the Deputy Under Secretary of Defense (Installations)

<sup>3</sup> DoD's Process for Disposing of Closed Bases, IDA Paper P-3116, July 1999, provides a complete history to that date on the legal context of BRAC.

owned property on which federal government operations will be terminated, the federal government, agency, or instrumentality with jurisdiction must identify those properties where no hazardous substances or petroleum were stored, released, or disposed. Regulatory concurrence that property is determined to be “uncontaminated” is required from the Administrator of EPA if the property is part of a facility on the National Priorities List (NPL) or from a state official if the property is part of a non-NPL site.

## **2. Economic Development Conveyance**

In 1993, the Deputy Under Secretary of Defense (Environmental Security) developed, and the President announced, a Five-Part Program to revitalize base closure communities. The program included jobs-centered property disposal that put local economic development first. This authority became known as the Economic Development Conveyance (EDC), which provided the authority to transfer property in support of job creation to local redevelopment at or below the fair market value. Lengthy and protracted negotiations regarding the value of base property were time consuming and required appraisals of estimated fair market value. Negotiations became protracted and adversarial.

Prior to April 24, 1998, the date DoD issued the guidance on early transfer, it was not possible to transfer property until remediation was complete. With emphasis by the President’s program on reuse and job creation, the Services turned to leasing their installations. Leasing provided a revenue stream to help finance the transition and ongoing caretaker costs. However, properties under long-term lease, while helpful in defraying some installation and base Operations and Maintenance (O&M) costs, ultimately become a burden. Many leases are for 50 years. They become a burden to the LRA because leases limit re-use flexibility; and they become a burden to the Services because of the obligation they incur as long-term commercial and industrial landlords, a role not consistent with their core business.

## **3. No-Cost Economic Development Conveyance**

While use of the EDC authority achieved some successes, it became a time consuming, and sometimes adversarial, process. In 1999, Congress passed new legislation, generally referred as the no-cost EDC. It permits property to be transferred to a Local Reuse Authority (LRA) without consideration, provided the property is used for job creation purposes and any proceeds from the property are reinvested in economic

development of the property. The objective of the new legislation was to accelerate the transfer of property ownership.

#### **4. CERCLA Amendment**

One of the most significant, and potentially useful, pieces of legislation, is an amendment to CERCLA enacted in 1996.<sup>4</sup> It allows early transfer of contaminated property before all remediation actions have been completed. Before this law, 42 U.S.C. 9620 (h)(3) prohibited DoD from transferring property until all cleanup actions had been completed. With the addition of subsection (C) to that statutory provision, the United States is now allowed to transfer title to real property and to allow the transferee, pursuant to an appropriate contractual relationship, to execute the cleanup with funds provided by the Services. This authority enables DoD to fully integrate cleanup with redevelopment and achieve levels of programmatic efficiency not possible previously.

#### **B. BRAC FUNDING AND CLEANUP STATUS**

BRAC requirements are funded within the overall Military Construction Account.

Specific funding is designated for cleanup, compliance, planning, and administration with the bulk of the funding for environmental restorations. BRAC FY98 funding is shown in Table 1.

**Table 1. BRAC FY98 Funding (\$K)**

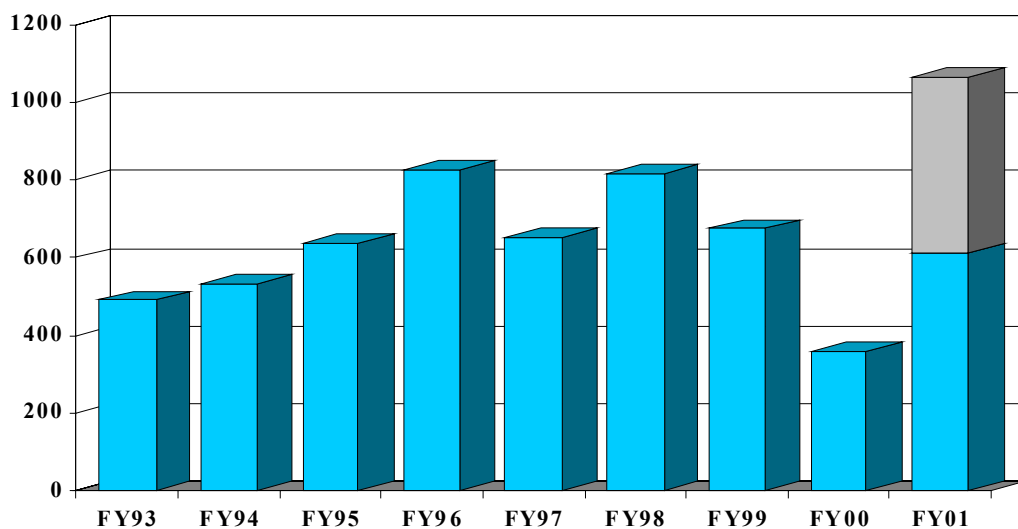
<b>Service/Agency</b>	<b>Cleanup</b>	<b>Compliance</b>	<b>Planning</b>	<b>Administration</b>	<b>Total</b>
Army	133,948	29,941	-	20,254	184,343
Navy	212,769	90,186	6,603	32,695	342,253
Air Force	137,891	80,958	4,669	32,958	256,476
DLA	8,978	469	43	1,386	10,876
Total	493,586	201,554	11,315	87,493	793,948

The BRAC environmental funding profile is shown in Figure 1. The spike in FY01 represents \$454 million in deferred FY00 outlay. The estimated cost to complete remaining environmental restoration beyond FY01 at current BRAC sites, exclusive of unexploded ordnance (UXO), is about \$1.9 billion.<sup>5</sup>

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<sup>4</sup> CERCLA Section 120 (h)(3)(C), September 1996.

<sup>5</sup> Defense Environmental Restoration Program FY 1998 Annual Report to Congress, June 18, 1999



**Figure 1. BRAC Environmental Budget Funding Profile**

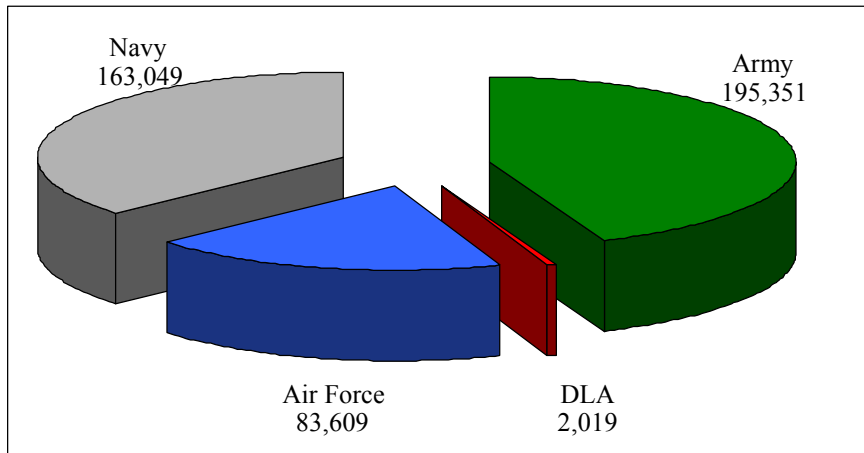
An analysis of the FY98 BRAC Cleanup Plan Abstracts is available at <http://www.dtic.mil/environdod/brac/>.<sup>6</sup> This document states that there are 112 major installations, which will transfer 444,253 acres out of DoD.<sup>7</sup> This is 97 percent of all acres to be transferred. A breakdown of these installations by BRAC round and by Component is shown in Table 2 and Figures 2 and 3.

**Table 2. Breakdown of BRAC Installations by Component and BRAC Round**

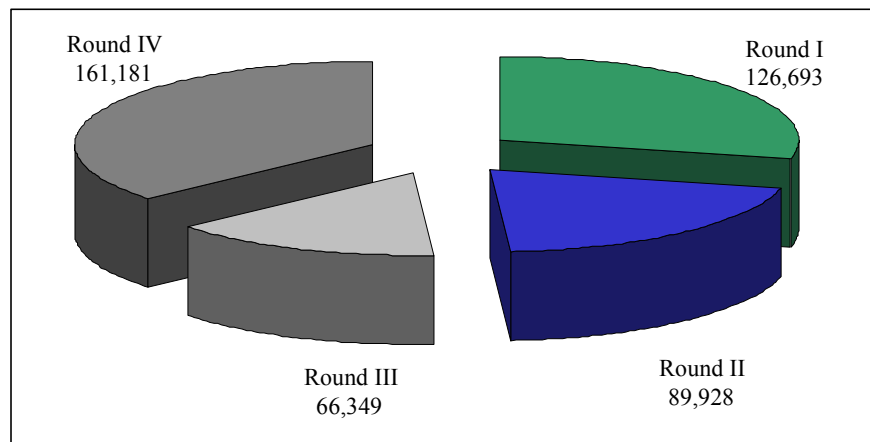
BRAC Round	Number of Installations				Total
	Army	Navy	Air Force	DLA	
I (1988)	11	3	5	-	19
II(1991)	5	9	14	-	28
III(1993)	3	19	5	2	29
IV (1995)	20	10	4	2	36
Total	39	41	28	4	112

<sup>6</sup> FY 98 Cleanup Plan Abstracts, OADUSD (Environmental Cleanup), August 3, 1999. The number of installations does not include small installations, which often consist of only a few acres of property. FY99 data was unavailable at the time this report was prepared.

<sup>7</sup> These acreage and breakdown totals in Figures 2 and 3 were taken directly from the FY 98 BRAC Cleanup Plan Abstracts. The figures do not total exactly.



**Figure 2. Acres To Be Transferred by Component**



**Figure 3. Acres to be Transferred by BRAC Rounds**

Environmental restoration requirements have been completed at 45 percent of sites. All investigations are scheduled to be complete by FY03 and most of the remaining sites are projected to be cleaned according to CERCLA requirements by FY05. Sixteen percent of the acres with on-going environmental restoration work can also be transferred by deed with the use of the Early Transfer Authority (ETA).

The FY98 BRAC Cleanup Plan Abstracts also notes that non-CERCLA issues can affect property at BRAC installations. These include petroleum, oils, and lubricants (POL), UXO, and natural and cultural resources (NCR). UXO affects almost 27 percent of all acres to be transferred out of DoD and more than 57 percent of Army acres to be transferred. NCR impacts 11 percent of all acres to be transferred. POL is also a



significant issue at Defense Logistics Agency (DLA) installations, affecting more than 24 percent of the DLA acres to be transferred.

The Defense Environmental Restoration Program (DERP) Fiscal Year 1998 Annual Report to Congress provides the following information on the number of BRAC installations and sites:

**Table 3. FY 1998 Installation Inventory Summary<sup>8</sup>**

Service/Agency	Installations	Sites
Army	117	1,944
Navy	53	1,004
Air Force	31	1,544
DLA	4	288
TOTAL	205	4,780

A “site” refers to a discrete area (or parcel) on an installation where cleanup actions are underway or where investigation of possible contamination is occurring. From a total of 4,780 sites comprising about 444,000 acres to be transferred, DoD has transferred or leased about 132,000 areas, or 30 percent of the total. Twelve percent of the acres were transferred and 18 percent were leased. The majority of properties thus remain on DoD’s books, rather than in private hands. It is not possible from available data to determine the precise number of remaining acres or sites that meet all environmental regulatory requirements for transfer.

The BRAC property disposal process is described in detail in the DoD Base Reuse Implementation Manual (BRIM). The BRIM prepared by the Office of the Deputy Under Secretary of Defense (Industrial Affairs and Installation) was prepared in late 1997 with the purpose of providing a common set of guidelines for the Services’ base reuse implementation teams.<sup>9</sup>

The reuse planning begins following the date of approval of the base closure or realignment. The community forms a Local Reuse Authority (LRA), which is the vehicle for base reuse activities. The LRA represents the impacted community and provides the leadership and direction for the base reuse plan. The DoD Office of Economic

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<sup>8</sup> The number of installations in Figure 3 differ from Table 2 because the smaller installations are not included in Table 2.

<sup>9</sup> DoD Base Reuse Implementation Manual, Office of the Deputy Under Secretary of Defense (Industrial Affairs and Installation, December 1997).

Adjustment (OEA) recognizes one LRA for the area comprising the installation. During the first six months, the military departments offer the properties to other DoD agencies and Federal government entities. Properties not claimed are declared surplus property. The Base Closure Community Redevelopment and Homeless Assistance Act of 1994 requires the LRA to then offer the properties for use by the homeless and to state and local government. The LRA considers notices of interest and develops a reuse plan, which balances the needs of the local community economics interests and those of the homeless. The Services must consider the environmental impacts as part of the reuse planning, and prepare an Environmental Impact Statement (EIS) and a cleanup plan. The traditional pattern for base restoration under BRAC has the military Services completing base cleanup using in-house staffs supported by private sector remediation contractors before property is transfer to the LRAs.

### **C. CHANGING OSD OBJECTIVES**

DoD's own goals and objectives for the BRAC program have changed over time. While OSD established overall goals and objectives, SECDEF delegated execution responsibility to the respective Services. Initially, DoD's goal was to maximize their revenue by selling the surplus property at market value through a "negotiated sale" or a "public bid." However, disposal of surplus land, buildings, and property on military bases was slow and cumbersome because of the need to accommodate a wide range of interests that were given standing by law.

A number of changes in OSD policies and program goals since the beginning of BRAC have prompted several sets of reforms, including changes in the definition of "success" used to determine the performance of BRAC managers. These changes have created conflicting negotiation positions, caused delays in property transfer, and created confusion.<sup>10</sup> IDA panel members noted at the first meeting that initial policy guidance emphasized sale of the property while the President's Five-Part Program stressed job creation resulting in the Services, particularly the Air Force, moving toward leasing of property. With the ETA available in 1996 enabling the transfer of contaminated property prior to remediation, some of the Services have begun moving in the direction of privatization.<sup>11</sup> Privatization in the context of this report is defined as the transfer of

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<sup>10</sup> DoD's Process for Disposing of Closed Bases, IDA Paper P-3116, July 1995.

<sup>11</sup> Concept Paper-Success Stories: Using Privatization and Improved Performance Models to Expedite Cleanup and Reuse, March 23-24, 2000 (see Appendix B).

assets to the LRA/developer that occurs at the time of title transfer. To obtain an independent review of the BRAC process, in 1995 the Office of the Assistant Secretary of Defense for Economic Security commissioned the Institute for Defense Analyses to conduct a study entitled *DoD's Process for Disposing of Closed Bases*. The study examined the current process for base disposal and identified some policy alternatives for DoD. The study concluded that despite the cumbersome process, DoD was doing a fair job of balancing the myriad of divergent interests and appeared to be improving performance. The report stated that any additional reform at that time would introduce uncertainty, particularly with the outset of the BRAC 1995 round.

The Deputy Under Secretary of Defense (Environmental Security) asked Clean Sites to conduct a review of the DERP in 1997.<sup>12</sup> The Clean Sites study addressed the cleanups being conducted for the DERP and the BRAC program. The report noted that DoD has taken significant steps to meet the challenge. Recommendations to improve the program included:

- Better communication of the program's mission and goals,
- More extensive use of the Internet as a management and communications tool,
- More structured quality assurance/quality control program,
- More efficient and lower cost contracting with emphasis on performance-based contracting,
- Increased partnering with the regulatory agencies, and
- Meaningful public involvement.

The report noted that the Services had shown flexibility in experimenting with different management approaches but that improvements in efficiency and responsiveness were needed.

To help local communities cope with the loss of military jobs, DoD and congress made a commitment to the reuse and redevelopment of BRAC properties. Through the end of Fiscal Year 1998, DoD has invested almost \$5.5 billion in environmental cleanup and closure-related environmental compliance and planning.<sup>13</sup> The primary goal of these expenditures has been to render BRAC property environmentally suited for transfer to

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<sup>12</sup> Clean Sites, Independent Management Analyses, August 1997. Clean Sites is a public, not-for-profit organization dedicated to implementing solutions to environmental contamination problems.

<sup>13</sup> Department of Defense FY 98 Environmental Restoration Program Annual Report to Congress, June 18, 1999.

support community redevelopment, generate new jobs, create tax revenue for communities, and minimize economic impact from base closure.<sup>14</sup>

#### **D. OBJECTIVES, SCOPE, AND APPROACH OF IDA STUDY**

The Deputy Under Secretary of Defense (Environmental Security) held an Industry Forum in January 1999 to address BRAC environmental cleanup and property disposal. This meeting provided an opportunity for industry and government to exchange ideas for streamlining the cleanup and transfer of BRAC properties. Recommendations from the Forum included the use of risk sharing and allocation, and highlighted issues such as the availability of cost-cap insurance, legal liability insurance products, guaranteed fixed-priced contracts, and determination of property's highest and best use. Other opportunities discussed included partnering with the private sector to accelerate property development, and the use of innovative contracting with state agencies.

This Institute for Defense Analyses (IDA) study builds on recommendations from the Industry Forum and subsequent meetings between DoD officials, industry, and other private sector experts with experience in cleanup and transfer of contaminated properties. During 1999, DoD explored the use of some of the innovative technologies and approaches recommended by industry as well as others initiated by the Services such as fixed-price contracts and privatization of remediation activities to determine if they improved cost effectiveness and performance. This report addresses the applicability of innovative approaches from the private sector and other stakeholders for developing environmentally contaminated properties, examines existing program successes, and assesses the potential to improve the BRAC process. Options considered include the use of new tools available to DoD, the Local Reuse Authorities (LRAs) and developers, and other process changes. These new tools include early transfer authority, the no-cost economic development conveyance (EDC), and environmental insurance. Early transfer authority allows Federal agencies to transfer property before all necessary cleanup

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<sup>14</sup> The Department clearly intends to help communities affected by BRAC to make a successful economic transition "... the Department is determined to carry out the President's promise to help base closure communities reshape their economic future. This assistance comes in many forms: technical assistance and planning grants; on site base transition coordinators to provide a focal point for Federal assistance; accelerated property disposal to make surplus available for civilian reuse; and fast tract environmental cleanup in coordination with Federal and State and regulators and community reuse authorities." BRAC 1995 Report to Congress. See also: Base Closure Community Assistance Act (Pub.L. 103-160, Title XXIX, Subtitle A; and Base Closure Community Redevelopment and Homeless Act of 1994 (Pub.L. 103-421).

actions have been taken. The no-cost EDC legislation passed in 1999 permits property to be transferred to an LRA without consideration provided the property is used for job creation.

## **1. Objective of the Study**

IDA was tasked by the Assistant Deputy Under Secretary of Defense (Environmental Cleanup) to explore options and to recommend changes DoD could make to the BRAC process to expedite the transfer of BRAC lands to the receiving communities, through the LRAs.<sup>15</sup> IDA's approach was to identify barriers to successful property transfer and best approaches and ideas that could accelerate the transfer process for existing BRAC sites and future BRAC rounds. While expediting environmental cleanup is a major issue in accelerating the transfer of property, the study looked more broadly at the process, beginning with the announcement of a BRAC round and ending with title transfer to a non-DoD owner.

## **2. Scope**

This study applies to current and future domestic BRAC sites. The study's findings and recommendations, particularly those concerning the integration of cleanup and reuse, address cleanup in the context of the BRAC-specific issue of property divestiture and community reuse. As a result, these findings may not be broadly applicable to other elements of the DoD cleanup portfolio, (e.g., active base cleanup) without further study. The study focused only on changes the Department could make, not the changes the communities or the regulators would have to make in order to accelerate property transfers.

The study was conducted over a 4-month time frame, from December 1999 through April 2000. Because of the short time frame available for the study and the complexity of the task, some issues (e.g., unexploded ordnance) were not addressed in detail.

## **3. Approach**

The study methodology was highly interactive, with the majority of information coming from current stakeholders in the process, including:

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<sup>15</sup> DoD Competitive Sourcing and Privatization: Remediation Issues and Alternatives, IDA Task Order AM-1-1798, Amendment No. 1, August 19, 1999.

- Local Reuse Authorities (LRAs)
- Military departments
- State and federal regulators
- Real estate developers
- Legal experts
- Trade associations
- Not-for-profit conservation organizations
- Environmental non-governmental organizations.

The study team also obtained the viewpoints and experience of industries that own excess contaminated property in order to compare and contrast their approaches to cleanup and disposal with those of DoD. The military services, LRAs, contractors, and legal experts were interviewed and the information gathered revealed complex situations and relationships among stakeholders. All of the Services had developed some excellent approaches/responses to these situations.

In order to understand the barriers to property transfer and explore ways to overcome them, IDA convened a panel of outside experts and conducted two panel meetings. IDA selected and invited panel members based on their subject matter expertise of the BRAC process, environmental cleanup, property transfer, and privatization. These experts included Local Reuse Authorities, military department personnel, state and federal regulators, real estate developers, non-governmental organizations, and not-for-profit organizations such as The Nature Conservancy (TNC) and the Trust for Public Lands (TPL).

The first meeting was held at IDA on February 2, 2000. The attendee list is provided in Appendix I. IDA selected some preliminary topics based on the results of a January 1999 meeting convened by OSD and some preliminary discussions with key stakeholders. At the meeting the panel identified a number of impediments to efficient transfer and partitioned into groups, each of which was responsible for preparing a paper on a major area of interest. These major areas were:

- Industry Approaches to Improving Cleanup Performance
- Cost Savings and Improved Performance from DoD Initiatives
- Marketing/Value Creation Strategies of BRAC Properties
- Use of Developers/Financial Institutions for Property Transfer
- Environmental Liability and Insurance

- Community Involvement and Public Participation in Cleanup
- Legal, Administrative, Internal Government Management Issues, and Barriers to Privatizing Cleanup.

Paper Chairs/Co-Chairs agreed to establish work groups to prepare Concept Papers, which they agreed to provide to IDA by March 15. The papers served both as the basis for more in-depth discussion at a second panel meeting, and for analyses and evaluation by IDA. Work group Chairs were instructed to include broad representation in their membership in order to obtain input from all sides of topics. IDA identified additional work group participants, and solicited input from a variety of interested organizations, other government organizations, and the military Services. The instructions for preparing the Concept Papers are provided in Appendix J. The work groups used a variety of approaches to obtain input from their members such as conference calls, e-mail, meetings, and the like. Work groups and participants volunteered considerable time and energy preparing their papers and briefings. The list of contributors to the work groups and chairs is provided in Appendix K.

In addition, IDA conducted extensive meetings and interviews with LRAs, government officials, and lawyers representing various communities, developers, insurance companies, and other parties involved in the BRAC process. The second panel meeting was held on March 23-24, 2000, at which the Concept Paper Chairs and Co-chairs presented their results. The attendee list is provided in Appendix K. The Panel Chairs discussed the work group findings and provided recommendations for IDA to consider in their report. These included recognition of success stories and existing programs and approaches that are working well, potential process changes, best practices, administrative reforms, and legislative changes. The full concept papers and briefings are in Appendices A-G.

## SUMMARY

The Department of Defense has made great strides since the early days of Base Realignment and Closure (BRAC) to determine the most effective ways of remediating sites and helping communities realize their ultimate vision for reuse of the property. During the years since the first BRAC round, DoD has tried a number of different approaches and developed a number of options that work well. They have sought independent review of the BRAC program, sought legislative improvements to accelerate the program, and listened to the advice of the private sector that have similar cleanup problems albeit on a smaller scale. Nevertheless, there is concern that property transfer is taking too long, is slowing down and goals are not being met. In many, but not all cases, properties are being shown on DoD's status reports as slated to be turned over to a Local Reuse Authority, but the transfer process has been delayed. DoD has alerted Congress of its need for additional BRAC rounds and announced its intention to ask for them next year. For these reasons, it is important for DoD to:

- Accelerate its divestiture of properties in order to demonstrated its ability to effectively execute the BRAC program
- Reduce its “case loads” in preparation for future rounds,
- Fulfill the expectations Government has created with local communities for jobs and economic development.

This study identifies those things that work well, and recommends specific actions DoD can take to apply those best approaches in a coherent manner to accelerate the transfer of BRAC properties to local communities for their economic benefit.

The findings, conclusions and recommendations of the study are presented below. The findings represent specific conditions the study team found. The study team arrived at conclusions about the condition of the BRAC program based on the findings. The findings and conclusions are grouped together and categorized onto three main areas:

- Internal DoD Organization, Management and Processes
- DoD Relationships with External Stakeholders
- Use of Available Tools

These findings and conclusions are more fully explained in the main report.



## A. FINDINGS AND CONCLUSIONS

### 1. Internal DoD Management, Organization and Processes

The following findings and conclusions relate to internal DoD management, organization, and processes:

- *The most expeditious approach for DoD to divest itself of property and fulfill government commitments to community redevelopment is to integrate cleanup and transfer into a single turnkey operation performed under the auspices of a developer with expertise in environmentally contaminated properties.*

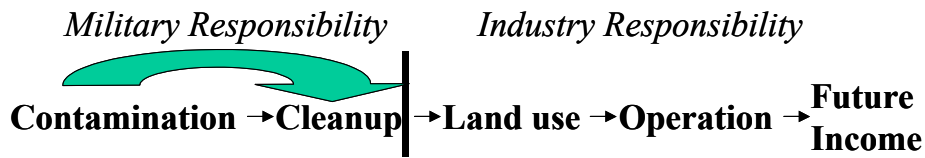
The study team found data on the pace of cleanup and transfer difficult to decipher, and the pace of cleanup and transfer slow and slowing even further. The study team's central conclusion is that privatization is the most expeditious way for DoD to divest itself of property and benefit the community. Privatization involves approaching cleanup and transfer as an integrated, turnkey operation performed under the auspices of a developer with expertise in environmentally contaminated properties. Implementing privatization requires use of early transfer authority, and early and meaningful involvement of the LRAs, developers with experience with contaminated properties, regulators, public interest groups and other stakeholders. Establishing the ultimate end use of the property and settling on a reuse plan of adequate detail to determine remedies are essential early steps. These events set the stage for use of early transfer authority.

The remaining findings and conclusions provide supporting evidence for this primary conclusion, and the recommendation lead to its implementation. Integrating cleanup into a well-established reuse plan and shifting the cleanup execution to the private sector using early transfer authority will:

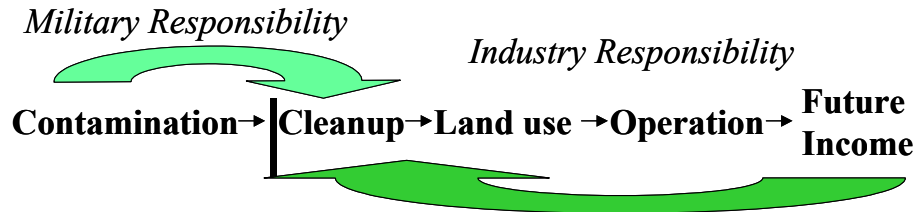
- Accelerate property transfer
- Accelerate beneficial economic reuse of property
- Increase tax revenues to local communities
- Reduce the cost of the BRAC program to the government

Privatizing BRAC requires DoD to promulgate new policy that establishes a clear set of operating principals. These principals would govern agreements among the LRA, regulators, and community stakeholders; and focus the entire process on the ultimate reuse of the property as the primary consideration. Figure 4 compares the existing process with the new process that would result from implementing IDA's recommendations.

**Current Model**



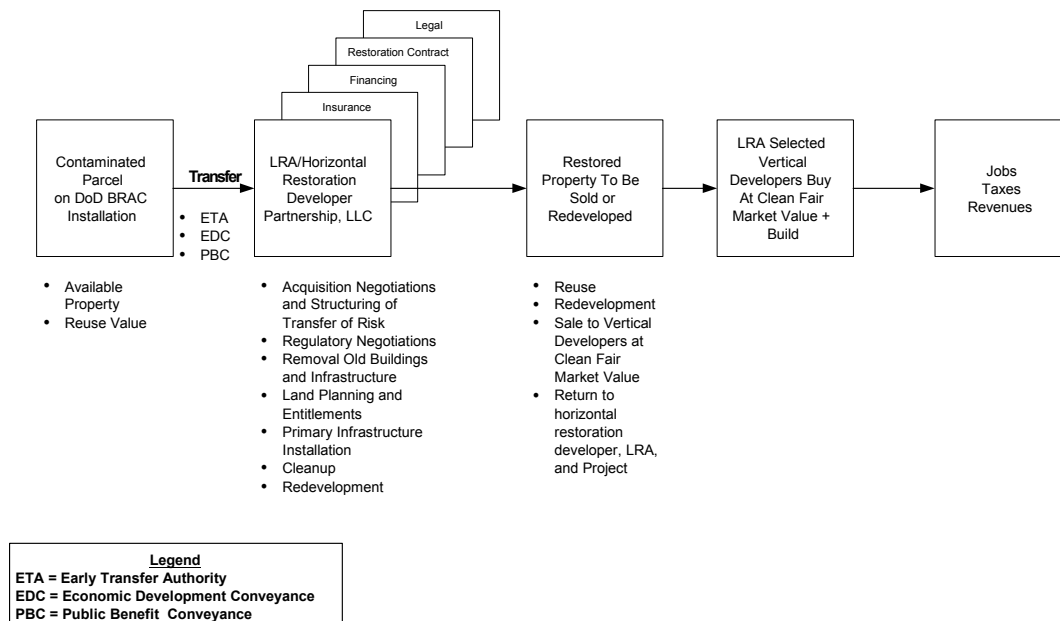
**IDA Model**



**Figure 4. New BRAC Process Using Early Transfer**

The current process has the cleanup conducted by the military before the transfer of the property. The most expeditious approach is to transfer the contaminated property to the LRA/developer with funding for cleanup, consistent with the land use plan using early transfer authority. This approach may or may not be appropriate for all existing BRAC properties, depending on their current status and site-specific circumstances. It may also be more difficult, but not impossible, to implement on “upside-down properties,” where the cost of remediation are higher than the private sector’s perceived value of the property. This is particularly true if there is little potential for economic development or private sector interest in the property. However, early transfer that is focused on ultimate reuse incentivizes the private sector to complete the cleanup and property transfer in order to achieve reuse expeditiously.

Figure 5 shows the players and their roles under the new process that privatizes cleanup through use of early transfer authority. Public participation is an essential component of this process and must be initiated early in order to secure “buy in” of the reuse plan and environmental remedies prior to transfer.



**Figure 5. Privatized BRAC Process<sup>16</sup>**

- *The availability of BRAC funding represents an area of uncertainty for DoD, LRAs and developers.*

BRAC funding currently competes within DoD's POM process against other military priorities, such as readiness and weapons systems modernization. The POM is an annual exercise, thus restricting DoD's ability to make multiyear funding commitments. These conditions create uncertainty for the LRAs and their developers. It also creates fiscal constraints that restrict the number of early transfers the Services can execute.

- *A unifying framework at the OSD level would promote consistent policies and drive better integration of the cleanup and property transfer functions at the Service and installation levels.*

The Services interpret federal policy differently, resulting in inconsistent approaches. Local Reuse Authorities that work with more than one Service must contend

<sup>16</sup> Flowchart showing early transfer process provided by Booz-Allen Hamiton.

with different rules. This causes confusion and delay, and confusion. Differing interpretations of progress make oversight by OSD difficult.

- *Closer integration of the Services' and OSD's cleanup and property transfer functions would increase efficiency of the BRAC process.*

The cleanup and property transfer functions within OSD and the Services are not well integrated. The bifurcation of cleanup and transfer responsibilities in OSD and the Services has resulted in the military not speaking with one voice with respect to condition and readiness of property. Cleanup and property transfer functions maintain different data for different purposes, however they are neither integrated nor consistent. Statistics regarding the status of cleanup are not linked to the type of regulatory approvals needed to transfer title. Data on the status of property transfer do not reflect expected transfer dates or milestones.

- *A more consistent process and framework for early partnering among the Services, LRAs, regulators, public interest and other stakeholders would enable more effective management of the BRAC process.*

Participation at the local level by LRAs in cleanup decisions and Base Cleanup Team participation in LRA decisions is inconsistent. Public notice and opportunity to comment may fulfill legal requirements but do little to engender trust and cooperation. Services and local practices differ widely in how actively they foster integration of various stakeholder roles. More active and uniform practices to involve all stakeholders in decisions that affect the marketability and community reuse of properties would avoid misunderstandings and misinterpretations that cause delay and foster mistrust.

- *Managing a complex real estate divestiture and development requires a skills set beyond DoD's core mission.*

Commercial real estate development, market value creation, easements and entitled property, economic redevelopment and securing private capital are skills fundamental to the success of BRAC program, but are unrelated to facilities management and public works activities that occur on military installations. As a result, DoD does not possess, nor is it necessary to DoD's core mission to possess, these skills.

- *Some properties are "stuck" in the current process and would benefit from intervention.*

A wide range of problems, such as divergent stakeholders viewpoints, lack of sufficient cleanup funds, reduction of staff, unreasonable reuse plans, inadequate site characterization, and delays in remediation schedules have all been cited as reasons for

slipping regulatory approvals, remediation schedules, development plans, title transfers, job creation and new tax revenue. While negotiations of this nature are unavoidably complicated, negotiations too often remain at impasse for unacceptably lengthy periods, economically impacting both DoD and the local community. These situations also highlight the “disconnect” between commitments made by the government to local communities, and the method for funding BRAC through DoD POM process. Some form of arbitration would help these “stuck” properties move forward.

- *The availability and condition of BRAC properties are not portrayed in a manner that allows developers, conservation organizations, and other potential investors to make informed decisions.*

Potential investors want information on availability of properties, ownership, location, condition, and contact. Obtaining information on property available for disposal and its condition is very difficult using the present databases; potential purchasers want easier access to information. It is in DoD’s interest to work with the LRAs to make marketing information readily available to potential investors.

## **2. DoD Relationships with External Stakeholders**

The following findings and conclusions relate to DoD's relationships with external stakeholders:

- *Better processes are needed to address LRAs concerns about risk exposure.*

The use of the economic development conveyance requires DoD to transfer property to LRAs. By inserting themselves in the chain of title, LRAs technically assume CERCLA liability for contamination. While in practice, if the LRA holds the property only long enough to transfer it to a developer and engage in no activities on the site it is unlikely they would be found liable, CERCLA still represents risk to the local community. The Services could improve their risk communication with LRAs by fostering a better understanding of environmental insurance, site characterization, and by including LRAs in all aspects of remedy consideration and selection.

- *The overlapping responsibilities of the Restoration Advisory Boards (RABs) and LRAs create potential for conflict.*

DoD currently funds two organizations at the community level with similar responsibilities. DoD’s cleanup offices establish Remediation Advisory Boards (RABs) to provide public oversight of DoD remediation activities at all installations with cleanup activities. Once an installation becomes a BRAC property, the Office of Economic

Adjustment establishes a LRA to determine the highest and best use of the property to meet community reuse needs and manage property reuse. The RAB predates the LRA, and differences between the functions of the two groups complicate DoD relationships with the local communities and often prevent the community from speaking with one voice. Integrating the RAB and LRA functions at the local level will drive resolution of issues to the local level and simplify DoD relations with the communities.

- *Some public interest environmental organizations perceive Land Use Controls as a method for DoD to avoid costly cleanups.*

Properties not cleaned to pristine conditions require some restrictions regarding allowed future use. Some environmental public interest groups maintain it is the government's responsibility to return property to the same condition as before the government began using it. In many cases, this is economically prohibitive, impractical, and not in the best interest of either the community or the government. Working with public interest environmental groups early and in a meaningful way can mitigate these situations.

### **3. Use of Available Tools**

The following findings and conclusions relate to the use of available tools:

- *Environmental insurance is a valuable tool for managing risks.*

Insurance can be used to protect LRAs, developers and DoD from schedule slippage and cost overruns. The Services and LRAs need to understand how insurance can facilitate cleanup and early transfer, and protect all stakeholders. Use of insurance also helps address risk concerns of LRAs when used in conjunction with risk communications.

- *More extensive use of early transfer authority would better integrate the cleanup and transfer functions within DoD.*

Under early transfer, the private sector executes cleanup, rather than the military Service. DoD's function is simplified, and becomes meeting the conditions necessary to enable early transfer. Responsibility for unknown contamination remains with DoD, and insurance can protect all parties. By focusing DoD's role on transfer, the goals of the cleanup and property transfer functions become more aligned.

- *More extensive use of early transfer authority would reduce total BRAC funding requirements, but require funding over a shorter timeframe than currently programmed.*

Early transfer involves transferring the title to a contaminated property plus funding a private entity to manage cleanup. While developers will make profit during the cleanup phase, they are paid when they sell product, in this case clean and entitled parcels of property to end users. As a result, they are incentivized to conduct the cleanup quickly and efficiently, and to integrate the cleanup as tightly with the ultimate reuse plan as possible. Under this scheme, the LRA and developer are also incentivized to finalize the reuse plan efficiently, which includes “buy in” from local public interest groups.

- *Firm-fixed-price remediation contracts offer best efficiency improvement if linked to property transfer.*

Where early transfer is not possible, firm fixed price protect installations from cost overruns, and provide more accurate cost estimates. If linked to early transfer, remediation can be managed as integral part of reuse schedule. Under these contracts, contractors are incentivized to deliver clean parcels of property on time and under budget, unlike time and materials contracts.

- *While there are no legal barriers to efficient property transfer, a number of legal issues sometimes create concern and cause delay.*

Statutory and regulatory requirements for cleanup and transfer are complex, but not major hurdles. Some delays could be reduced through legislative amendment or clarification, such as explicitly excluding LRAs from liability when they take title for the purpose of transferring property to developers, as described in conclusion number 8 above.

## **C. RECOMMENDATIONS**

Recommendations are the study team's best judgment of what DoD should do to address the conclusions, and are grouped into two categories: Baseline and Baseline Plus. The Baseline represents the study team's best judgment of a conservative set of actions DoD could take to produce meaningful improvement in the BRAC program. They are administrative in nature and require no new legislation. This should enable DoD to implement them in the short term. In order for the Baseline recommendations to produce meaningful improvement in the BRAC process, both the cleanup and property transfer functions within the Office of the Secretary of Defense and the military Services must recognize the need to improve the current process, and "buy in" to the recommendations.

Baseline Plus addresses specific conditions that may require remedies beyond the conservative measures proposed in the Baseline recommendations. The Baseline Plus Recommendations require legislative amendments. Specifically, one involves an amendment to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address risk exposure concerns of LRAs. The Baseline Plus recommendations could be implemented incrementally, or as part of legislation to authorize new BRAC rounds.

## **1. Baseline Recommendations**

- *Develop a unified OSD policy to serve as the primary BRAC program guidance document.*

This policy would include program purpose and goals, and would clearly state that cleanup and transfer are integral parts of the process, that property transfer, preferably using early transfer authority, is DoD's goal. This policy is an important step to institutionalizing privatization. Establishing cleanup and transfer as an integrated, turnkey operation performed under the auspices of a developer with expertise in environmentally contaminated properties is a significant change from the current BRAC model and the BRIM guidance. It can be applied to existing BRAC sites and to future BRAC rounds. In the short term, DoD could survey their remaining BRAC sites for their suitability for privatization.

- *Services train a cadre of skilled real estate negotiators who share an "end-use" -oriented, development-driven methodology to property transfer and who use a common approach.*

Service personnel serving as negotiators on property transfers need training in legal, economic and insurance aspects of negotiating early transfers, privatization, commercial real estate development, and real estate transactions. The IDA study team recommends DoD consider using outside experts in curricula development and training, in addition to subject matter experts.

- *Choose pilot sites to test concepts of value creation and development planning.*

Use change management teams to create partnerships, and apply innovative remediation and development strategies at selected sites to demonstrate application of an integrated approach.

- *Require common management tools.*



Establish a common data set to assess the status and progress of BRAC process and financial system to track the impact of early transfer and cleanup privatization to quantify savings. Standardize interpretation of statutes, regulations and guidance documents across the Services.

- *Create an inventory or clearinghouse of available military properties for marketing purposes.*

The database would provide readily accessible information about available land, ownership status, location, condition, contact points and other information necessary to attract potential investors. Recommend using outside experts in marketing commercial property to develop the data structure and identify methods of making it available to potential investors.

- *Consolidate LRA and RAB organizations and funding.*

Support a single organization for BRAC properties to address concerns of cleanup consistent with transfer of property, in lieu of the current arrangement, which includes LRAs to manage transfer and redevelopment and RABs to advise on cleanup standards and remedies.

- *Partner with LRAs to maximize the use of available tools to expedite property redevelopment and transfer and establish mutual expectations of performance.*

Support the LRAs with educational efforts in risk management, use of early transfer authority and no-cost EDC, use of horizontal developers, market valuation, and land use controls and environmental insurance.

- *Develop a process to enable a number of sites to be “bundled” or transferred to a non-DoD owner under an umbrella agreement.*

These bundling arrangements would allow a single entity to obtain multiple sites or installations through a single transaction. This mechanism could be used to transfer property to developers for economic reuse, or to not-for-profit conservation organizations for open space, smart growth partnerships, or wilderness areas.

## **2. Baseline Plus Recommendations**

- *Request a CERCLA amendment granting LRAs immunity from liability under certain circumstances.*

Such an amendment would exclude an LRA that acquires title to BRAC property from the CERCLA definition of “owner” when holding the title for a short period of time

for the purpose of transferring title to a developer. This would resolve LRA risk issues when using early transfer authority.

- *Give LRAs explicit timelines for transfer.*

Require LRAs to make a commitment to accept title within a certain period of time, or dispose of the property to highest bidder. Establishing such “outside closing dates” is standard practice in commercial real estate transactions. This also would require the government to commit to delivering clean parcels or to satisfy the requirements of early transfer by a specific date. Entering into a performance contract with the LRA would incentivize both parties to adhere to a schedule.

- *Request a legislative amendment to allow conversion of military housing to be eligible for transfer under the no-cost economic development conveyance.*

Allow conversion of former military housing to be considered as economic recovery.

- *Consider creating a separate organization for the disposal of military base closure outside of the Defense Department.*

This new organization would free DoD of the responsibility for providing personnel, transaction costs, O&M costs, cleanup costs and other management and funding obligations for BRAC. Creation of a new office would require a legislative amendment to the Federal Property Management and Administrative Services Act. It addresses a number of structural issues that cannot be addressed in other ways. One of the most significant issues involves the use of DoD funds, which compete in the POM process against readiness and weapons modernization, in furtherance of broad socio-economic goals related to community development. Establishing an external BRAC organization could be included as legislation authorizing a new BRAC round, or enacted as independent legislation. It could apply to the existing BRAC properties and to new BRAC rounds. There are widely differing opinions within DoD regarding the health of the current process. Some hold the view that cleanup and transfer schedules are slipping and cost to complete estimates are growing, for reasons not related to emerging issues such as UXOs and natural resource conservation requirements. Others hold the view that the program is healthy and functioning as intended. Ultimately, it is up to DoD to decide whether its BRAC record satisfies Congress' requirement for effective management, and whether Congress agrees that DoD can manage additional BRAC rounds in the future. Detailed examination of this option, including specific recommendations for operating

principals, organizational structure and other implementation details, are beyond the scope of this study.

## DISCUSSION OF FINDINGS AND CONCLUSIONS

Common themes emerged throughout our investigation, and a number of stakeholders expressed strong views on specific issues. The primary reasons are that BRAC properties are not returning to communities quickly enough, and delay is not in the best interest of the local community, DoD, or taxpayers. Of the 444,000 acres to be transferred, DoD has transferred or leased about 132,000 areas, or 30 percent. Twelve percent were transferred and 18 percent were leased.<sup>17</sup> The findings below represent opportunities to begin removing barriers, instituting new incentives, applying new tools, and creating a new business model for BRAC.

The findings represent specific conditions the study team found. The study team arrived at conclusions about the condition of the BRAC program based on the findings. The findings and conclusions are grouped together and categorized onto three main areas:

- Internal DoD Organization, Management and Processes
- DoD Relationships with External Stakeholders
- Use of Available Tools

### A. INTERNAL DOD ORGANIZATION, MANAGEMENT AND PROCESSES

#### 1. Approach of Choice

*The most expeditious approach for DoD to divest itself of property and protect community interest is to integrate cleanup and transfer into a single turnkey operation performed under the auspices of a developer with expertise in environmentally contaminated properties.*

The IDA study team's central conclusion is that the most expeditious way for DoD to divest itself of property and protect community interest is to approach cleanup and transfer as an integrated, turnkey operation performed under the auspices of a developer with expertise in environmentally contaminated properties. Integrating

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<sup>17</sup> FY 1998 BRAC Cleanup Plan Abstracts, OADUSD (Environmental Cleanup), August 3, 1999.

cleanup into a well-established reuse plan and shifting responsibility for cleanup execution to the private sector using early transfer authority will:

- Accelerate property transfer
- Accelerate beneficial economic reuse of property
- Increase tax revenues to local communities
- Reduce the cost of the BRAC program to the government

Successful real estate redevelopment efforts are generally structured from the end use backward, meaning that all cleanup actions are designed to support the ultimate end use.<sup>18</sup> To be successful, the LRA, regulators, citizen advisory groups, and other stakeholders, including DoD, must share the same vision of the end use and the plan to get there. One of our authors commented: "Public interest real estate transactions are never simple; to succeed they generally require an organized, facilitated alignment of popular support, funding, and technical and transaction details. The original holder of property, the transferee, legislative and agency officials, and the public at large all play a vital role." Envisioning the site's end use is a great partnership technique DoD and the LRAs can use to establish a common purpose. It is also a means for the LRAs to define the types of development it desires and to attract potential developers.

The most efficient model for transferring property is a process involving the LRAs, the regulators, and other stakeholders early; establishes the ultimate end use of the property; and focuses all activities within the process on transferring title to end users in the most expeditious manner possible. This process would necessarily involve developers capable of bundling the cleanup and reuse into an integrated turnkey operation, attracting private sector capital, and applying a commercial business model. Under the current process, DoD either retains title and responsibility for site cleanup or leases the site. Neither of these serves the fundamental objective of BRAC, which is divestment. From the DoD's perspective, transferring the deed can save years of O&M costs and avoid wasteful situations in which cleanup does not match the community's reuse plan. The community benefits include a tax revenue stream that begins sooner, greater community control over the cleanup, and elimination of the need to re-do aspects of a cleanup to match the reuse plan.

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<sup>18</sup> Concept Paper, *Use of Developers/Financial Institutions in the Cleanup and Transfer of Properties* Concept Paper Briefing , March 23-24, 2000 (see Appendix D).

Privatization is the most operationally efficient way for DoD to divest itself of the properties, minimize operation and maintenance costs, and protect community interests. Under this arrangement, all players are incentivized to complete cleanup expeditiously to return the property to economic reuse. Privatizing BRAC requires DoD to promulgate new policy that establishes a clear set of operating principals. These principals would govern agreements among the LRA, regulators, and community stakeholders; and focus the entire process on the ultimate reuse of the property as the primary consideration. Figure 4 compares the existing process with the new process that would result from implementing IDA's recommendations.

The current process has the cleanup conducted by the military before the transfer of the property. The more expeditious approach is to transfer the contaminated property to the LRA/developer for cleanup consistent with the land use plan using early transfer authority. This approach may or may not be appropriate for all existing BRAC properties based on their current status and site-specific circumstances. It may also be more difficult, but not impossible, to implement on “upside-down properties,” properties where the cost of remediation are higher than the private sector’s perceived value of the property. This is particularly true if there is little potential for economic development or private sector interest in the property. However, early transfer that is focused on ultimate reuse incentivizes the private sector to complete the cleanup and property transfer in order to achieve reuse expeditiously. Figure 5 shows the players and their roles under the new process that privatizes cleanup through use of early transfer authority.

There are many obstacles and disincentives within the current process to private-sector-led cleanup and development. Established environmental remediation “businesses” exist within the three Services, and all have large long-term time and material cleanup contracts in place with many remediation contractors. To the Services’ in-house organizations and their contractors, a switch to private developers represents a loss of business, a potential loss of DoD jobs, and a change from a well-known business climate for the contractors to a new set of clients. DoD and their traditional remediation contractors have virtually no experience with privatization of BRAC remediation activities. The military organizations that execute cleanup contracts argue that their competitive contracting process to commercial remediation firms is privatization. As noted earlier, privatization in the context of this report occurs at the time of title transfer. In addition, a number of panel participants noted that government organizations and their contractors that execute cleanup perceive deed transfers as a direct loss of business. The earlier the transfer, the greater the perceived loss.

A prerequisite to an efficient process is that both the LRA and the Service representative negotiating the deal be fluent in the technicalities and nuances of negotiating and closing commercial real estate transactions. These are not skills related to DoD's business. The business of commercial real estate development is very different than the installations management business practiced by DoD's real estate and engineering staffs. The Services are not trained or experienced in the end-use-driven approach to commercial real estate development, or in the legal issues controlling commercial property transfer. In addition, many LRAs are unaccustomed to overseeing large-scale property developments. Those near large metropolitan areas are more likely to have, or be able to obtain, the expertise than those in smaller, more rural communities. The study team recognized that many BRAC installations are located in less desirable locations where developers may have less interest. Nearby communities are small and the absorption of a sizeable installation into the community and management of development takes time.

The few successful development-driven early transfers have been the result of determination by sophisticated LRAs and the initiative of an individual Service negotiator, rather than the result of any systematic, DoD-wide process.<sup>19</sup> The Department of the Navy seems to place increased emphasis on minimizing long-term O&M expenses by implementing such a process. However, results are preliminary and have been demonstrated at only a few sites. Nevertheless, these "pilots" have adequately demonstrated the proof of concept and highlighted procedural issues that need further work.

Finally, the practice of developing environmentally contaminated properties is a relatively new business. With plentiful land, developers are more accustomed to moving farther away from industrial and urban centers to develop pristine land. However, slow growth initiatives and suburban sprawl are forcing developers to look for new opportunities. EPA's Brownfields program has provided a "training" ground for innovative developers and financial institutions looking for new development opportunities. BRAC is a logical extension of the techniques developed under Brownfields. While many LRAs have successful relationships with developers, as

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<sup>19</sup> Concept Paper - *Success Stories: Using Privatization and Improved Performance Models to Expedite Cleanup and Reuse*, March 23-24, 2000 (see Appendix B).

discussed in the recent M.I.T. study,<sup>20</sup> they tend to be traditional developers with no experience developing contaminated property.

Implementing this model requires developers that know how to horizontally develop contaminated properties.<sup>21</sup> Successful early transfer requires private sector partners with the capability to offer integrated, remediation-development turnkey solutions that meet the needs of the community, DoD, and the regulators. The expertise can be created a number of ways, including through partnerships between traditional environmental remediation contractors and traditional horizontal developers. Since not many developers specialize in contaminated properties, it is important that DoD publicize its goals and objectives in order to encourage the private sector to increase its capacity to maximize competition.<sup>22</sup>

## **2. Availability of Funding**

***The availability of BRAC funding represents an area of uncertainty for DoD, LRAs and developers.***

The barriers associated with funding derive from uncertainty regarding Congressional funding amounts, timing, and Anti-Deficiency Act concerns. The Anti-Deficiency Act precludes the military Services from obligating funds for purposes for which such funds have not been appropriated. This limitation on the commitment of the military Service to perform remediation represents an element of uncertainty. Even with the Environmental Cooperative Service Agreements, such agreements, if they are multi-year, of necessity will include a provision stating that they are subject to the availability of funds. The private sector is reluctant to accept the risk of a lack of funding by Congress, which will delay a project.

Funding for multi-Service installations is less certain because the funding request must survive the POM process of more than one Service. Since BRAC funding must

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<sup>20</sup> Bernard J. Frieden and Christie I. Baxter, *From Barracks to Business: The M.I.T. Report on Base Redevelopment*, Economic Development Administration, U. S. Department of Commerce, March 2000.

<sup>21</sup> The term “horizontal developer” is used throughout this paper to mean a developer who specializes in creating infrastructure to the ground level. This includes underground utility systems, roads and other ground level and underground improvements necessary for development. Those that specialize in developing contaminated properties integrate remediation and re-development to the ground level as a turnkey operation.

<sup>22</sup> Concept Paper- *Marketing, Value Creation, and Cost Savings: A New Paradigm for BRAC*, March 23, 2000 (see Appendix C).



compete within each Service's POM process with other military priorities, it is less certain that the funds required from all Services will survive their respective adjudication processes. As a result, there is risk that changing priorities within DoD may prevent a commitment of funds to the level of certainty needed by the private sector. The unavailability of funding at critical times hampers the LRA's ability to plan or meet their development commitments. This can delay the transfer of deed, have an adverse impact on the economics of the redevelopment plan, and affect the local economy.<sup>23</sup>

The concern about the availability of funding also affects the CERCLA warranty. While CERCLA provides that the United States is responsible in the event of newly discovered contamination, it makes no mention of when funds would be available for additional cleanup or the level of funding. An advantage of a private-sector-negotiated cleanup, with insurance to support cost overrun, is the elimination of these uncertainties. Insurance company representatives have stated that a delay in funding would affect their insurance position and they evaluate the potential for delay in the underwriting process.

The timing, scope, and funds available clearly will impact the early transfer process in terms of how many large, up-front funded projects the military Services can fund in one year. The Navy recently awarded an insured fixed-price contract for environmental cleanup at the Charleston Naval Shipyard. This was not an early transfer but use of this contract vehicle will allow the Navy to more readily meet its transfer deadline. The contract price was almost \$29 million. The Navy stated that existing budgetary constraints would allow them to handle only two or so projects the size of Charleston or Hunters Point a year. In the transfer of the Presidio of San Francisco, California, the Army agreed to transfer \$100 million to the Trust over a 4-year period for cleanup. Comparing the high number of properties left to transfer and their cost-to-clean estimates with the BRAC cleanup funds currently in the POM reveals an inability to support many early transfers that involve up-front funding.

### **3. Need for More Consistent Policies and Better Integration of the Process**

*A unifying framework at the OSD level would promote consistent policies and drive better integration of the cleanup and property transfer functions at the Service and installation levels.*

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<sup>23</sup> Personal Communication, Thomas O. Markham, Executive Director, Lowry Redevelopment Authority, March 2000.

Efforts over the last 7 years, since the Administration's Five-Part Plan to revitalize base closure, have resulted in many innovations that have made the process more responsive to community needs and focused on economic redevelopment. In the early years of BRAC, the environmental cleanup and property transfer communities and functional roles were separate and distinct. In more recent years the Offices of the Deputy Under Secretary of Defense (Environmental Security) and the Deputy Under Secretary of Defense (Installations) have partnered to address environmental cleanup and property transfer in a more integrated fashion. This has improved relationships with regulators, states, and communities, and continues to refine and streamline cleanup activities. However, the complexity of the process requires more uniform application of policies, consistency of process, and focus on the ultimate objective.

A consistent theme during the panel meetings and in at least three of the concept papers was the need for a unifying framework to end the perception that "no one understands why all three Services do things differently."<sup>24</sup> OSD and the Services tend to describe differences in the Services' implementation of BRAC as a competitive process that produces best practices. The LRAs and developers tend to describe the differences as adding unnecessary complications and confusion. The issue here is not whether competition is healthy; it is whether proceeding from a common set of policies, objectives, processes and capabilities would get the job gets done more quickly and efficiently.

When the BRAC program started, it was an undertaking on a scale unlike any previous property divestiture initiative, and far more complex because of environmental cleanup and liability issues. As a result, a certain amount of trial and error was necessary to find a process that worked. However, once trial and error has identified the "best practices," they should be used.

The differences in the Services' implementation may be attributable, in part, to the fact that GSA has delegated authority for the BRAC program to the Secretary of Defense who, in turn, has delegated it to the three Service Secretaries. Decentralization is not a *de facto* problem, however a problem emerges if those differences are perceived by other affected stakeholders in the BRAC process to look less like normal, healthy competition and more like fundamental differences of purpose. Each Service has interpreted federal

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<sup>24</sup> Meeting discussions, DoD Competitive Sourcing and Privatization Remediation Issues and Alternatives, IDA, March 23-24, 2000.

policy and statutes differently and there is a lack of uniformity in the disposal process and disposal contracts among the Services.

These differences are confusing to regulators, potential developers, and to those LRAs who must work with more than one Service. The clear message from stakeholders external to DoD is that these Service differences are causing confusion and delay. While a strict uniform approach to solving the BRAC problem is impractical because of differing site-specific situations, BRAC could likely be expedited if all of the Services operated from a common set of policies, objectives, processes, practices, interpretations, and capabilities.

It is difficult for DoD to exercise oversight given the division of responsibilities and functions at the OSD level, the divergent approaches adopted by the Services and the lack of common understanding of the following issues:

- What constitutes "progress" under BRAC? (An approach that fulfills the job-creating aspect of BRAC may not include divestiture.)
- What options are preferred versus minimum acceptable? (Is early transfer an option, or is it a preferred option?)
- What legal and administrative tools are available? (Why does the Navy alone use the Environmental Cooperative Services Agreement?)
- What timelines are acceptable? (Does the community have an indefinite time period to take the property, or should DoD mandate some period of time before the site goes to public auction?)

Some of the differences in Service implementation have been attributed to the differences in missions of the military Services and historic use of the properties. In most cases, however, the main reason is that independent decision-making leads to differences in the way the BRAC programs are structured and implemented.

#### **4. Need for Integration of Functions**

Closer integration of the Services' and OSD's cleanup and property transfer functions would increase efficiency of the BRAC process.

Each Service has been left to devise its own organization, structure, and approach for conducting BRAC. The Navy integrated its cleanup and transfer teams under the Naval Facilities Engineering Command (NAVFAC), while the Air Force and Army have essentially created separate and autonomous cleanup and transfer functions. From the perspective of many LRAs, a serious consequence is that the military does not speak with

one voice with respect to the condition and readiness of the property. One LRA described its job during a DoD-managed cleanup as that of "go-between for DoD's own cleanup and closure teams," and several pointed to loss of substantial investment dollars and serious schedule slippage after receiving ultimately conflicting responses from the cleanup and transition teams. As one LRA succinctly stated, "If even one facility is out of sequence, it impacts everything else."

Under BRAC, members of the cleanup team should in every sense also be members of the transfer team, since the ultimate goal is divestiture. The bifurcated approach, however, has created a situation in which those who handle cleanup are not geared, methodologically, to the transfer of property. Many examples were given during the meetings about cleanups proceeding well before the reuse plan was in place. The cleanup may not match the reuse plan, or the cleanup team and the regulators may arrive at agreements that are unacceptable to the LRA.<sup>25</sup>

To some extent, progress under BRAC is measured in terms of whether or not a site is clean and "ready for transfer," which misses the point. The measure for progress should be successful transfer and economic redevelopment. To achieve this goal, the case history suggests that numerous entities beyond DoD, such as developers, can not only contract to perform the cleanup as successfully and at less cost than the DoD, but can also meet the community's needs better by tying the cleanup directly to the reuse. The insurance underwriting process works better when the property is transferred to the private sector. Insurance firms prefer arrangements where the horizontal developer is one of the insured parties because their motivation is most closely aligned with on-time and on-budget completion.<sup>26</sup>

## **5. Early Partnering of Stakeholders**

*A more consistent process and framework for early partnering among the Services, LRAs, regulators, and other stakeholders would enable more effective management of the BRAC process.*

In some communities, the Base Cleanup Team (BCT) invites the LRA to attend and participate in the meetings. In others, the LRA is excluded and has little or no

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<sup>25</sup> Concept Paper—Internal Government Management Issues (see Appendix G).

<sup>26</sup> Personal Communication, Ronald A. D'Ambrosi, Gallagher Environmental Services, March 2000; Personal Communication, Lindeen Patton, Zurich American Specialties, December, 1999.

opportunity to evaluate the implications of cleanup decisions as they are being formulated. While public notice and opportunity to comment may satisfy legal requirements, they do little to engender trust and coordinate reuse. This is because the LRA, the end user of the property and most directly affected party, is excluded from the formative stages of remedy selection. As a result, there is no opportunity to integrate remedies with reuse.<sup>27</sup>

Similarly, the market impacts resulting from regulatory decisions cannot be ignored. Any failure to involve the LRA in the development of model agreements with regulators is counterproductive. It is not logical to exclude the LRA, the recipient of the property, from participating in agreements that will have implications for the reuse and marketability of BRAC property. This situation is of particular concern in California, where an LRA recently learned of an effort by the California Department of Toxic Substances Control (DTSC) and the Department of Navy to execute an institutional control covenant without its participation or knowledge.<sup>28</sup>

## **6. Managing Divestiture and Development**

*Managing a complex real estate divestiture and development requires a skills set beyond DoD's core mission.*

Commercial real estate development, market value creation, economic redevelopment, and securing private capital are skills fundamental to successful economic redevelopment of BRAC bases, but not skills related to developing military installations. Issues such as zoning, entitlements, easements, and capital financing are also integral to successful economic development. However, these are not issues at military installations, where funding is appropriated by Congress to satisfy facility and infrastructure decisions made by military professionals on the basis of military mission needs. As a result, federal facility managers lack experience in these important areas.

Companies that share DoD's need to divest themselves of excess industrial properties indicated that they relied on contractors with the skill sets necessary to expedite property transfer to compensate for their lack of experience and so they could focus personnel on the core missions of the company. Successful developments of

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<sup>27</sup> Concept Paper-*Impact of Privatization on the Community in the BRAC Cleanup Process* (see Appendix F).

<sup>28</sup> Meeting California Local Reuse Authorities, Boston, MA March 2000; L. Siegel, Digest for CPEO-Military, April 2000.

Brownfields sites have resulted from reliance on private sector Brownfield redevelopment expertise. EPA, with experience with the development of the Brownfields Program, and the General Services Administration, which has considerable expertise in property transfer, both stressed that unique skill sets are required to manage complex real estate developments.

## **7. Delays in Property Transfer**

*Some properties are “stuck” in the current process and would benefit from intervention.*

DoD has made progress towards their goal of transferring properties but the process has been more complex and slower than anticipated. Divergent stakeholder viewpoints, decentralized planning, lack of sufficient cleanup funds, reductions in DoD staff, and unreasonable reuse plans have all have been cited as reasons for delayed regulatory approvals, remediation schedules, transfers by deed, development schedules, and unmet communities reuse needs. For example, the LRA representing Mare Island Naval Shipyard in Vallejo, California, cited the following barriers: (1) insufficient funding for environmental cleanup and (2) the Navy’s position that it does not have to abide by local state standards. Hunters Point, Treasure Island Naval Station in San Francisco, California, has stalled over a difference of opinion in cost of remediation in support of the reuse plan.<sup>29</sup> Where housing has been the LRA's main reuse objective (e.g., Tustin Marine Corps Air Station and Hamilton Army Air Field), delays have been created over whether affordable housing on a base becomes a part of area-wide economic recovery supporting new off-base jobs.<sup>30</sup> This is important because housing is not currently eligible to be transferred without consideration under the no-cost economic development conveyance because housing is not deemed to create jobs.

Lowry Air Force Base, located in Denver, Colorado, (second BRAC round in 1991) is often cited as a model of base closure success. The 1,866-acre site is being transformed into a mixed-use community incorporating a full range of housing, a business-park, a retail town center, parks, and open space. At Lowry the single biggest impediment to their success has been the delay in cleanup. According to the LRA director, DoD designated 84 percent of the installation (not on the NPL) as needing no

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<sup>29</sup> Concept Paper- *Marketing, Value Creation*.

<sup>30</sup> Personal Communication, Paul Reimer, February 2000.

further action, which has been disputed by local regulatory agencies. The cleanup is now far behind schedule and continues to slip, which makes it difficult to secure new end users and impedes redevelopment. According to communication from the Lowry LRA, “due to the lack of action, only two acres were conveyed to the LRA between February 1999 and January 2000. This meant that \$10 million net to Lowry in real estate transactions did not close, 600 jobs were not created, and 244,000 square feet of office space and 150 homes were not built.”<sup>31</sup> The situation at Lowry will continue to get worse this year unless interventions are made to bring the environmental cleanup into step with the development program that was based on agreed property transfer dates.

Work group participants cited a number of similar situations where disagreements between the military, regulators, and LRAs on property value, remediation costs, standards for cleanup, etc., are delaying progress, increasing costs, and causing economic development opportunities to be lost. The group suggested that intervention by independent mediators might be appropriate.

It is important to recognize that not all BRAC properties are located in economically desirable locations. In some situations, limited site reuse flexibility adds an additional complicating factor. In situations where cleanup costs exceed economic value of the clean properties, the site is referred to as “upside down.” In some cases, LRAs are reluctant to take BRAC properties in order to avoid caretaker costs, unless specific end user(s) of the sites are identified. Frequently, properties are near small communities with limited experience in real estate development and limited knowledge of the process to create value and determine the highest and best property use. Some communities lack the experience necessary to understand the full range of redevelopment options available or to select appropriate consultants and developers needed to execute redevelopment programs. Stronger partnership programs between DoD and the LRAs may help resolve these obstacles

Disconnects between cleanup and economic reuse objectives were highlighted by cases where cleanup costs are higher than the obvious economic value of the property. This is most likely to occur in areas with depressed property values and high levels of contamination. From the government’s perspective, it may make good sense to invest more in cleanup than the fair market value of the property would indicate, particularly if the investment provides the impetus or has the potential to turn around an economically

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<sup>31</sup> Markham, Thomas, Lowry Redevelopment Environment White Paper, April 2000.

depressed community. The return on investment through tax receipts and reduced public assistance outlays may be very attractive. However, this brings us back to the issue of DoD's POM process and the appropriateness of requesting DoD program funds for what is essentially an investment to serve a broader economic and social purpose. The POM process prioritizes DoD spending and incentivizes the Services to minimize the cost of individual programs. However, the government made commitments to local communities affected by BRAC. This situation presents a challenge to the government and DoD and invites the question regarding whether the mechanism used to fund BRAC is consistent with the commitments the government has made to local communities.

## **8. Portrayal of Availability and Condition of BRAC Properties**

*The availability and condition of BRAC properties are not portrayed in a manner that allows developers, conservations organizations, or other potential investors to make informed decisions.*

Obtaining accurate data on the status and availability of the BRAC properties is extremely difficult. A number of different organizations collect different information and present it in different forms for different audiences and for different purposes. Many LRAs have excellent marketing material describing their properties.

The Office of Economic Adjustment (OEA) maintains a Base Reutilization Status Report that provides data on major base closures and realignments. The information focuses on civilian positions lost as a result of base closure and new jobs created as a result of reuse activity. It also includes information on the number of leases in force and deeds transferred. The purpose of this report is to track new job creation. It does not provide a status on property still available for transfer, or how many deeds or leases remain to be executed, or the condition or number of acres available for transfer. A newly released report using data from the BRAC Cleanup Plan Abstract provides BRAC metrics installation property transfer status (Appendix H) that is very helpful since it provides in one report a status of acres transferred. DoD is aware of their need for improved communication with stakeholders and potential installation developers, and OEA's conferences and outreach programs demonstrate their interest.

Each Service's database satisfies their own reporting and tracking needs and program management purposes. As a result, each Service collects different data and measures things in different ways. Data are available in differing degrees on their Web sites. The Services and OSD have made considerable progress using their Web sites to



communicate information to their stakeholders. Of the three Services, the Air Force Base Conversion Agency “report card” provides the clearest status of their total program in terms of a general picture of acres available for transfer by BRAC round.<sup>32</sup> The Air Force initiative to define the site close out process by bringing together guidance and model documents and making them available on their Web site has contributed to the consistency of the process and an ability to exercise more positive control over the process.

The annual Defense Environmental Restoration Program (DERP) Report to Congress provides an appendix on the Environmental Condition of BRAC Property, which includes a summary of its environmental condition. Assessments of the condition of individual sites are conducted in accordance with CERFA and its implementing policy, DoD Policy on the Implementation of the Community Environmental Response Facilitation Act (May 1996). An Environmental Baseline Survey (EBS) documents the condition of the property, however the data is largely in narrative form and provides little information on reuse. This makes it very difficult to use for marketing purposes. The report also provides information on the facility, its identification number, acreage to be transferred out, CERFA-clean acres by condition according to defined categories, and CERFA-uncontaminated acres concurred on by the regulatory authority. Appendix D of the DERP Annual Report for 1998 says 319,655 acres of the 454,576 acres leaving DoD (70 percent) have been proposed by DoD as “CERFA” clean. This makes it appear that 70 percent of the acreage is suitable for transfer under a Finding of Suitability for Transfer (FOST) or Finding of Suitability for Early Transfer (FOSET). However, closer inspection of the numbers reveals that regulators have only concurred on the suitability for transfer of 93, 873 acres (20 percent).<sup>33</sup>

In reality, much of the DoD-approved acreage is “unsuitable” for transfer because it contains unexploded ordnance. Managing abandoned munitions and contaminated ranges is a major challenge. DoD is actively working on UXO problems and policies, while addressing the requirement to develop technologies to locate and clear UXOs. At the end of FY98, UXO potential affected about 26 percent of the property leaving DoD, with five installations accounting for about 86 percent of such acreage. Installations such as Jefferson Proving Ground, Fort Ord, Fort McClellan, and Adak Naval Station, among

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<sup>32</sup> AFBCA’s Progress to Date “Report Card,” [www.afbca.hq.af.mil/report/index.htm](http://www.afbca.hq.af.mil/report/index.htm).

<sup>33</sup> Fiscal Year 1998, *Annual Report To Congress; Defense Environmental Restoration*, Appendix D, June 1999.

others, are CERFA clean but are encumbered with UXO. Other encumbrances such as historic preservation, wetlands, friable asbestos, and dilapidated buildings are not considered a legal impediment to transfer under CERCLA. The result of these differences in interpretation is substantial confusion over which properties are ready for transfer and which are available for potential purchasers.

These misunderstandings develop because different organizations use different definitions for different audiences and for different purposes. A number of LRAs complain that the DoD's presentation of the data to Congress potentially jeopardizes the funding and priority that DoD and the individual installations receive in the budget process.

DoD's interest in expediting property transfer is clear. However, it has left to the LRAs the task of identifying the specific properties available for transfer to third parties and their condition. For example, OSD states that 84 percent of lands are suitable for transfer under CERCLA.<sup>34</sup> This may be meaningful to DoD, but as one of the panel authors notes, " ... the meaning of the 'suitable for transfer' terminology is considerably ambiguous." This is because UXOs, specific hydrocarbons, and other contaminants are not covered under CERCLA. For example, at the Adax Naval Facility in Alaska, one survey participant noted that more than 145,000 acres were designated as suitable for transfer when in fact approximately 74,000 of those acres were still contaminated with UXOs.

Panel members recommended that DoD clarify the availability and condition of the properties in terms that are meaningful to developers and other interested organizations such as the Nature Conservancy or the Trust for Public Lands. Developers looking at a Service website might conclude the transfer process was going smoothly, since all the lands seem to be accounted for—that is, identified for transfer to an LRA. OEA's "Parcels" website is a step in the right direction, but "Parcels" lists only those properties already transferred to an LRA. Properties that have stalled in the transfer process because of lack of a developer or a regulatory problem, or properties that the LRA does not want, are very difficult to find. As a result, potential purchasers are confused over which properties are available. In addition, some efficiency could be gained from bundling numerous sites on different bases to a single developer. However, identifying opportunities for such bundled transfers may be lost or compromised. In the

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<sup>34</sup> FY1998 BRAC Cleanup Plan Abstracts.

words of one panel participant: "What I want is a list. Show me what properties are available, tell me where they are, who they belong to. Are they already owned by an LRA, or do I go directly to the DoD? And if it's the DoD, who do I talk to?"<sup>35</sup>

## **B. DOD RELATIONSHIP WITH EXTERNAL STAKEHOLDERS**

### **9. Risk Management and Risk Communication**

*Better processes are needed to address LRAs concerns about risk exposure.*

There is a wide range of LRAs, from the very sophisticated with long-standing and well-established development authorities, to those that have never before dealt with issues associated with large-scale development projects such as reuse plans and institutional controls. Because divestiture of property to an LRA is the fundamental objective of the BRAC program, the skill and effort DoD applies to working with the LRA will have a great deal of impact on the BRAC program's success.

LRAs are at risk in two ways. First, they are ultimately accountable and have a fiduciary responsibility to the people of the community they serve. DoD's objective is to transfer BRAC properties based on a community driven planning process. In most cases the property goes to LRAs, but other organizations and government agencies can take deed to the property as well. By accepting title to the deed, the LRA is putting itself in the chain of custody. By placing itself in the chain of custody to a contaminated property, the LRA exposes the taxpayers of the community to liability. This is joint, strict, and several liability under CERCLA and includes pre-existing contamination, even when the contamination is clearly the consequence of prior military activities. While the risk may be low because the LRA is not engaged in activities that contribute to contamination, and usually takes title only for the short time required to transfer title to developers, the community has still accepted legal liability.<sup>36</sup> Insurance and DoD's ultimate liability for the contamination shield the community from risk. However, the insurance products are relatively new, and some LRAs are concerned that once DoD is released from the site it will be difficult to get it to return to fix anything that goes wrong with the cleanup or to deal with newly discovered contamination. In reality, insurance does not relieve the Government of its CERCLA responsibility, and DoD is responsible

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<sup>35</sup> Meeting discussions, DoD Competitive Sourcing and Privatization Remediation Issues and Alternatives, IDA, March 23-24, 2000.

<sup>36</sup> By accepting title, the LRA meets the definition of "owner" under CERCLA (42 USC 9601 et seq).

for its contamination in perpetuity. However, CERCLA does not stipulate how quickly DoD must respond, or the level of funding they are to provide. Insurance can provide instantaneous funding to a level stipulated in the policy. The notion that insurance relieves DoD from responsibility is a misconception that requires public outreach and risk communications skills to correct.

Second, the local elected officials are ultimately responsible to the public they serve for the outcome of the redevelopment effort. Their liability is in the ballot box and is based on community reaction over the ultimate financial success or failure of the redevelopment.

The study team identified three important areas for the Services to improve communications about risk with the LRA.

## **10. Overlapping Responsibilities of the RABs and LRAs**

*The overlapping responsibilities of the Restoration Advisory Boards (RABs) and LRAs create potential for conflict.*

Many of the Restoration Advisory Boards (RABs) were created prior to base closure, and the issues they deal with are more appropriate to the cleanup of an active site. Some RABs have linked their efforts to those of the LRAs and focused on future redevelopment better than others. The meeting participants agreed that in general, RABs have helped improve communications between the military and the public. However, not all RABs are alike; some work better than others.<sup>37</sup> LRAs usually have their own public participation programs dealing with the issue of deed transfer and ultimate site reuse-decisions that depend heavily on inputs from the cleanup process. However, it is unusual for LRAs and RABs to work together. Generally, one member of the RAB sits on the LRA and represents the RAB's viewpoint. In essence, DoD has funded two independent organizations at the community level to deal with what is essentially only one issue under BRAC: transfer of the site for beneficial reuse. Some meeting participants argued that DoD is funding a situation designed to create conflict and delay progress. Current procedures for privatizing with early transfer do not adequately provide for continuing the necessary work of the RABs. Some community representatives viewed privatization or localization of cleanup management as a way to promote efficiency and tailor

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<sup>37</sup> Concept Paper-*Impact of Privatization on the Community in the BRAC Cleanup Process* (see Appendix F).

responses to the community need. Others expressed concern that privatization represents a way for the Services to walk away from their full environmental responsibilities and not fulfill their policies supporting community redevelopment.

## **11. Land Use Controls**

*Some public interest environmental organizations perceive Land Use Controls as a method for DoD to avoid costly cleanups.*

Land use controls (LUCs), including institutional controls (IC), are legal mechanisms to protect human health and the environment by restricting access or exposure to contaminants present on a site. “Engineering controls” (ECs) are engineered mechanisms such as a cap on a landfill, designed to physically ensure access or exposure to the contaminants in question is prevented. LUCs are used to protect ongoing remedial activities and to ensure viability of the remedy, and ICs are specifically provided for in CERCLA. Controls can involve the placement of restrictions on the land through the use of “covenants to restrict use of property” at installations being closed *and transferred by DoD*. With environmental cleanup funds from Congress decreasing, DoD is being forced to reduce the amount of cleanup it can perform, delaying property transfer. LRAs are concerned that DoD may push for land use controls in lieu of more complete site cleanup.

## **C. USE OF AVAILABLE TOOLS**

### **12. Use of Environmental Insurance**

*Environmental insurance is a valuable tool for managing risks.*

Environmental insurance is an important tool to facilitate early transfer because it can protect the LRA, the developer, and even DoD against unforeseen contamination, schedule slippage, and cost overruns.<sup>38</sup> Panel participants agreed with the findings of the work group on this subject; however, several industry participants noted that their companies choose not to buy environmental insurance in all cases because of the cost and/or the nature of the cleanup. Environmental insurance is normally used by the LRA or its developer to protect the LRA that acquires the property under early transfer, then possesses the title for the purpose of contracting with a firm to perform the environmental remediation. “What formerly was uncertainty with respect to the cost of cleanup can now

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<sup>38</sup> Concept Paper- *Environmental Liability and Insurance* ( see Appendix E).

be reduced to risk, and that risk can be passed on to an insurance carrier for a fixed fee, provided that there is adequate site characterization to allow the parties to evaluate the most likely cost of cleanup and to insure against cost overruns."<sup>39</sup> The Office of the Assistant Deputy Under Secretary of Defense (Environmental Cleanup) has recently published a Fact Sheet on the Use of Environmental Insurance in an effort to advise LRAs on how environmental insurance can be used to facilitate cleanup under early transfer and enhance government-provided indemnification.

Adequate site characterization is also a prerequisite to the LRA or developer's ability to purchase insurance. The problem of incomplete site characterization is not unique to BRAC sites. Private sector transactions occur without complete characterization, but the cost of the insurance might be higher. There is a perception that the Services sometimes try to negotiate cleanup costs for privatized remediation that are based on incomplete site characterization. This jeopardizes the possibility for obtaining insurance, a factor that generally works against the government for two reasons. First, it will take longer to transfer the site, and second, the government can be named as a co-insured, such as under an Environmental Cooperative Services Agreement. "If the military Services are serious about having the private sector accept responsibility for environmental remediation, the Services will have to do a better job of site characterization and come to the realization that the cost of cleanup is essentially a sunk cost, whether the funds have been appropriated or not. Such recognition will allow the Services to negotiate in a manner that will facilitate rapid transfer. This requires a clear understanding by the parties of the environmental condition of the property."<sup>40</sup>

The CERCLA warranty under 42 USC 9620(h)(3) requires the government to return in the event new contamination is subsequently discovered, but does not say when nor does it provide certainty with respect to level of funding. In addition, although the United States says it is self-insured, it sets no funds aside to pay for losses that arise from CERCLA 120 or 330 claims.<sup>41</sup> Environmental insurance purchased by private developers can both address cost overruns and the subsequent discovery of

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<sup>39</sup> Concept Paper-*Legal and Policy Impediments to Privatized Environmental Cleanup of Base Realignment and Closure Properties* (see Appendix G).

<sup>40</sup> Concept Paper-*Legal and Policy Impediments to Privatized Environmental Cleanup of Base Realignment and Closure Properties* (see Appendix G).

<sup>41</sup> Comptroller General opinions establish this principal.

contamination. Further, if the insurance carrier waives the right of subrogation, then the insurer, not the DoD, pays.

Environmental insurance is a tool to manage potential legal, financial, and environmental risks. LRAs can also purchase their own insurance for costs related to the interruption of business resulting from newly discovered contamination. Although DoD provides statutory protections under CERCLA, the insurance provides an additional assurance that funds will be available until a party is actually compensated by DoD. The federal government can provide funds as an allowable cost for parties purchasing insurance in conjunction with property transfer or restoration. The military is beginning to embrace the use of environmental insurance, and it has been successfully used in selected circumstances involving early transfer by the Navy at the Fleet Industrial Supply Center in Oakland, California, and in the firm-fixed price contract for cleanup at the Charleston Navy Shipyard.

#### **a. Environmental Insurance**

Environmental insurance shields LRAs that take an early transfer of property (i.e., while the property is still contaminated and remediation is underway or has yet to begin). It is essential that DoD understands how and under what conditions environmental insurance can be employed.<sup>42</sup> This should be a precondition for any meeting between a Service representative and an LRA. If DoD comes to the table with an LRA or developer without this knowledge, DoD is at a significant disadvantage. The reasons for this are as follows:

- If the Service representative does not understand insurance concepts—particularly in situations where the government can be named as a co-insured—then some of the best options for both the Service and the LRA will be left off the table.
- The LRAs are concerned that there be a clear linkage between the potential for changed standards and the amount of funding provided, particularly under changing regulatory schemes.
- Environmental insurance can play an important role in helping enforce institutional controls.

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<sup>42</sup> Concept Paper—*Environmental Insurance*.

## **b. Level of Site Characterization**

Few LRAs will be interested in a site that is not well characterized, and the same can be said of prospective developers whose insurance costs are directly related to how well the level of risk is quantified. Several LRAs cited cases where DoD did not adequately characterize its sites, then attempted to structure a deal with LRAs in which the costs to clean were understated. Several LRAs stated that the Environmental Baseline Survey is not an adequate baseline to support a Finding of Suitability to Transfer (FOST).<sup>43</sup>

## **c. Inclusion of LRA When Obtaining Regulatory Buy-in**

The Services should not make any arrangements with regulators without LRA participation. LRAs should be involved in all discussion with regulators regarding remedy selection, institutional controls, and at all other critical junctures.

## **13. Use of Early Transfer Authority Aids Integration of DoD Functions**

*More extensive use of early transfer authority would better integrate the cleanup and transfer functions within DoD.*

Early transfer is a relatively new process that drives closer integration of remediation and reuse functions and accelerates transfer. It appears to offer meaningful benefits to both DoD and the local community. The community gets faster beneficial reuse, and DoD achieves certainty of cleanup costs and an end to caretaker expenses and landlord responsibilities. DoD expects many more early transfers in the future. As noted in the concept paper *Success Stories: Using Privatization and Improved Performance Models to Expedite Cleanup and ReUse*, there are examples from each Service of early transfer that ended caretaker costs and put the property into reuse more quickly.

With the advent of the no-cost EDC, the cost to cleanup is no longer an offset to the sale of the property. During the meeting, several LRAs and LRA legal representatives indicated the Services may be trying to compensate for that loss by driving the cost of privatized cleanup down to levels that the LRAs and developers find unacceptable.<sup>44</sup> In general, the effect of DoD attempts to negotiate downward its own published estimates of the cost to clean is to produce offers that are rejected by the LRAs

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<sup>43</sup> Concept Paper-Marketing, *Value Creation*.

<sup>44</sup> Concept Paper - *Internal Government Management Issues, Administrative and Legal Barriers to Transfer of Military Property*, March 24, 2000 (see Appendix G).



and their developers, and that stalls the transfer process. While DoD can probably realize some cost savings through privatized remediation, it would still benefit even if it paid a contractor the same as it would cost to retain control of the remediation. In addition, recurring O&M costs that DoD pays during a protracted process could eventually outweigh any cost savings from negotiating a lower price for cleanup.

There is also a difference in perception of the value of the property being turned over. The government tends to view the installations as valuable, developed properties with significant infrastructure and facilities. Developers, on the other hand, view much of the infrastructure as inconsistent with local codes, practices, or commercial zoning, and representing significant rehabilitation or demolition costs. Some installations have buildings contaminated with lead-based paint and asbestos, and LRAs and their developers point out the high costs of demolition.<sup>45</sup>

Other disconnects between the LRAs and DoD also affect the use of early transfer, such as differences in expectations. Communities' expectations stem from DoD policies and public law.<sup>46</sup> DoD and Congress worked together to create a community expectation that DoD would be responsible for cleaning the property consistent with the community reuse plan. The meeting revealed disagreements over the definition of "highest and best use." A private sector perspective offered is that the highest and best use is not an ideal use but a rational analysis of a site's potential. A military spokesman offered that the term "highest and best use" is an economic term and is determined by four factors:

- Is it physically possible?
- Is it legally permissible?
- Which uses are financially feasible?
- What use generates the maximum productivity?

The Air Force Base Conversion Agency Fact Sheet notes that the highest and best use is the "likeliest use of the property that results in the maximum property value, produces the highest monetary return, or serves the public interest."<sup>47</sup> Often the

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<sup>45</sup> Concept Paper- Marketing, Value Creation and Cost Savings Concept Paper, March 23, 2000.

<sup>46</sup> DoD Competitive Sourcing and Privatization Remediation Issues And Alternatives for BRAC Sites, Meeting Minutes, Institute for Defense Analyses, March 23-24.

<sup>47</sup> Air Force Base Conservation Agency Fact Sheet, *How does the Air Force Determine the Value of BRAC Property*, ([www.afbca.hq.af.mil/factshts/fapraisl.htm](http://www.afbca.hq.af.mil/factshts/fapraisl.htm)).

underlying issue is under what circumstances does DoD pay to clean to less costly industrial standards, and when to clean to the higher commercial or residential standards. The law requires remediation, but not necessarily the removal of contaminants or remediating for residential use. A number of LRAs indicated that in some cases achieving the “highest and best use” of the land required remediating to a higher level than DoD was willing to fund, and that estimates they received from private developers were less than the DoD estimate to achieve the higher standard. DoD may wish to confirm that its policies and procedures for determining cleanup standards are appropriate and equitably applied.

A few participants expressed concern that communities’ expectations also may be inconsistent with the current process by which the BRAC program competes for priority within the Program Objective Memorandum (POM) process against military readiness needs.<sup>48</sup> While forcing BRAC funding to compete within the POM process provides the Services with an incentive to use the funds efficiently, it also incentivizes them to minimize the program cost. This may work at cross purposes with community expectation that the government is obligated to remediate properties to their “highest and best use” and transfer the property in a timely manner for economic redevelopment.

One of the prerequisites of an early transfer is up-front funding by the government for the cost of cleanup plus other allowed costs. Sometimes the funding can be spread over a few years, but the numbers are large and consume more than their fair share of the annual allocation BRAC cleanup funding. As a result, financial realities could limit the expanded use of privatization unless the Services took specific actions within the POM process to change the funding profile of the BRAC program by requesting larger annual outlays but over a shorter number of years than the current program of record. Initial indications are that total outlay under an aggressive privatization program would reduce the total cost of the BRAC program.

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<sup>48</sup> POM, short for Program Objective Memorandum, is a process used to determine DoD’s Future Year Defense Program (FYDP). Program managers submit and defend their funding requirements over the coming 6-year period, and an adjudication process allocates funding within the constraints of the total budget authority established by OMB and the President. This process takes place at all levels up to the Secretary of Defense and the President’s budget submission to the Congress. The DoD POM process takes 8 months to complete and is part of the annual budget process. For more information, see *Guide to the Environmental Security Budget* at [www.denix.osd.mil/denix/Public/Library/Envirsb/envirsb.html](http://www.denix.osd.mil/denix/Public/Library/Envirsb/envirsb.html).

#### **14. More Extensive Use of Early Transfer Authority Reduces Total BRAC Costs**

*More extensive use of early transfer authority would reduce total BRAC funding requirements, but require funding over a shorter timeframe than currently programmed.*

Early transfer involves transferring title to contaminated property plus funds to a private entity to manage cleanup. While developers will make profit during the cleanup phase, are paid when they sell product, in this case clean and entitled parcels of property to end users. As a result, they are incentivized to conduct cleanup quickly and efficiently, and to integrate the cleanup as tightly with the ultimate reuse plan as possible. Under this scheme, the LRA and developer are also incentivized to finalize the reuse plan efficiently, which includes “buy in” from local public interest groups.

As noted earlier, the Navy recently awarded an insured fixed-price contract for environmental cleanup at the Charleston Naval Shipyard. The contract price of almost \$29 million is 17 percent less than the government cost-to-clean estimate. At the Navy's Oakland Fleet Industrial Supply Center (FISC), the Navy estimated they achieved approximately \$27 million per year in cost avoidance and \$9 million in caretaker costs by transferring the property early. In the transfer of the Presidio of San Francisco, California, the Army agreed to transfer \$100 million to the Trust over a 4-year period for cleanup. The Army saved \$22.6 million per year in operating costs once the property was transferred.<sup>49</sup>

While there has not been extensive use of early transfer authority, experience to date indicates that greater use would probably reduce the total funding requirement compared to DoD retaining control of the cleanup. However, the funding would be required sooner than is programmed in the current POM.

#### **15. Firm-Fixed-Price Remediation Contracts**

*Firm-fixed-price remediation contracts offer best efficiency improvement if linked to property transfer.*

Firm-fixed-price contracts protect installations from cost overruns, both remedial and administrative, and provide more accurate estimates of cleanup costs and budget

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<sup>49</sup> Concept Paper, *Cost Savings and Improved Performance from DoD Initiatives*, March 23-24, 2000 (See Appendix B).

projections.<sup>50</sup> The contract deliverable is a clean site. The Navy is using a fixed priced contract at the Charleston Naval Shipyard. The Army has two pilot programs underway involving firm-fixed-price contracts for cleanup at Rio Vista Army Reserve Center and Camp Pedricktown. The Air Force is exploring the use of fixed-price contracts at several sites, but as of the writing of this paper had not yet awarded any. In all cases, the contractors have purchased environmental insurance and the Services anticipate considerable cost savings over their previously estimated cost to clean. However, these contracts are for cleanup only, and none are linked to agreements with LRAs to accept the properties. DoD has considerably more leverage to negotiate transfer dates with the LRAs before awarding the contracts than after. A more efficient approach might have been to require the LRA to accept the property under early transfer and pass the cleanup funds to the LRA. This would allow the LRAs and their chosen developers to manage the remediation as an integral part of their reuse plan and schedule.<sup>51</sup> The use of the early transfer authority reduces caretaker costs, allows the property to be put into reuse more quickly, and provides opportunities for the private sector to participate in integration of property and reuse.

## **16. No Legal Barriers to Property Transfer**

*While there are no legal barriers to the transfer process, a number of legal issues could cause delay.*

### **1. Section 330 of the FY93 Defense Authorization Act**

This Act indemnifies transferees of closing defense property from liability for release or threatened release of environmental contamination caused by defense-related activities. It was intended to facilitate BRAC property transfers, but was poorly crafted in that it only provides coverage for third-party claims, as distinguished from a direct loss by the transferee. It does not address the limitations resulting from the Anti-Deficiency Act. Furthermore, the provisions of 42 USC 9620(h)(3) and the 330 indemnity are void if the claimant is responsible for the contribution to environmental impairment. What constitutes such contribution is uncertain. When the private sector accepts remediation responsibility that would otherwise be the obligation of the United States, the potential

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<sup>50</sup> Concept Paper-*Site Remediation and Redevelopment: An Overview of Industry Experience*, March 23, 2000 (see Appendix A).

<sup>51</sup> *Outsourcing/Privatization of BRAC Cleanup*, 26<sup>th</sup> Environmental Symposium, National Defense Industrial Association Conference, March 27-30, 2000.

liability for failed or improperly performed remedy may render the private sector subject to joint, strict, and several liability under CERCLA. This is a risk that may inhibit a private investor unless insurance limits exposure. Of particular concern are cases in which the military Services have attempted to contractually vitiate the indemnity in Section 330. Two examples were reported where Section 330 indemnification language was weakened in the contractual documents.<sup>52</sup>

## **2. Remedy Selection**

Under Executive Order 12580, the Secretary of Defense is responsible for selecting the remedy for DoD property. In the event of early transfer with third party remediation, the question arises as to the remedy selection process and whether it is subject to approval by the military Service (in order to retain the control of remedy selection under EO 12580). If the remedy is not selected by the military Service, then the validity of the delegated authority to the Secretary of Defense for remedy selection is in question and may invoke the authority of the Environmental Protection Agency to approve remedies.

## **3. Remedy Failure, Changed Environmental Standards, and Newly Discovered Contamination**

The DoD, in a 25 July 1997 policy pronouncement, acknowledged its continuing responsibility for environmental remediation under such circumstances. However, it remains uncertain who bears the risk and cost associated with environmental remediation if the work is to be performed by the private sector, particularly if the remedy entails institutional or engineering controls that require long-term monitoring and enforcement.

## **4. Chain of Custody**

The LRA is the only entity that can obtain title to BRAC property at no cost, pursuant to the zero-cost EDC. It is common for the LRA to be in the chain of title for the sole purpose of transferring the property to a developer. However, there are legal consequences that arise from the definition of "owner" in the CERCLA (42 USC 9601 et seq). As an owner, the LRA is exposed to the potential for joint, strict, and several liability for pre-existing contamination, even when the contamination is clearly the consequence of prior military activities. The consequences of this risk are of concern to

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<sup>52</sup> *Legal and Policy Impediments* (see Appendix G).

most LRAs. And they are exposed to that risk, however slight, solely by virtue of being in the chain of title.<sup>53</sup>

## **5. Housing on Military Base Falls Outside Job Creation Category for Zero Cost EDC**

Existing housing on military bases is not eligible for transfer without consideration under the terms of the no-cost economic development conveyance. This is because housing is not considered to create jobs, a requirement for property to transfer under the zero-cost EDC. The only exception is if the housing is required for workers in industries that replace jobs lost at the closed base. LRAs argue that affordable housing is a justifiable part of an area-wide recovery, particularly where creating housing is the main reuse objective of the redevelopment (e.g., Tustin Marine Corps Air Station and Hamilton Army Air Field). Further, housing areas are generally uncontaminated or easily cleaned. As a result, the transfer of housing becomes a point of contention; it does not transfer quickly, and deteriorates. As a result, rather than becoming an asset to the community, it becomes an additional cost to the military.<sup>54</sup>

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<sup>53</sup> *Legal and Policy Impediments* (see Appendix G).

<sup>54</sup> Personal Communication, Paul Reimer, Reimer Associates, February 2000.

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## DISCUSSION OF RECOMMENDATIONS

DoD, Congress, and local communities all have an enormous interest in the success of the BRAC process. The uniqueness of this large-scale reduction and reorganization of military bases has no precedent. As a result, DoD has had to be flexible when federal procedures proved troublesome.<sup>55</sup> This IDA study is part of a series of DoD initiatives to evaluate best business practices and make continuous management improvements in BRAC cleanup and transfer. Panel participants and other experts made a major contribution and spent considerable time and effort to offer their views and prepare concept papers. The process of producing this report, including extensive discussions and collaborations to develop the concept papers, changed perspectives and opened thinking to new models for BRAC even before the report was finalized.

There is no direct mapping of a single finding to a single recommendation, since a number of recommendations address more than one finding. Collectively, the recommendations represent remedies to all the key findings. In addition, the findings and recommendations tend to focus on issues of process, not organization. While some issues, such as bifurcation of cleanup and transfer functions, appear to be rooted in organizational structures, the recommendations in this report are based on implementation of process remedies. These process remedies can be implemented either by integrating the functions of separate organizations or through organizational change. Deciding which is the most effective approach requires an in-depth analysis of the portfolios of the DoD organizations impacted, and how reorganization would impact other functions. Such an effort is beyond the scope of this study.

Recommendations are the study team's best judgment of what DoD should do to address the conclusions, and are grouped into two categories, Baseline and Baseline Plus. The Baseline represents the study team's best judgment of a conservative set of actions DoD could take to produce meaningful improvement in the BRAC program. They are administrative in nature and require no new legislation. This should enable DoD to implement them in the short term. In order for the Baseline recommendations to produce

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<sup>55</sup> Freiden, Bernard and Baxter, Christie, op.cit.



meaningful improvement in the BRAC process, both the cleanup and property transfer functions within the Office of the Secretary of Defense and the military Services must agree there is a need to improve the current process, and "buy' in" to the recommendations.

Baseline Plus addresses specific conditions that may require remedies beyond the conservative measures proposed in the Baseline recommendations. The Baseline Plus Recommendations require legislative amendments. One involves an amendment to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address risk exposure concerns of LRAs. The Baseline Plus recommendations could be implemented incrementally, or as part of legislation to authorize new BRAC rounds.

The new organization external to DoD would remove BRAC installations from DoD ownership and turn remediation and transfer responsibility and execution over to a separate organization. This organization would have a core mission to address the broad socio-economic issues related to community investment and redevelopment, and be empowered to acquire the commercial property development expertise necessary to efficiently transfer properties to meet local reuse needs.

## **A. BASELINE OPTIONS FOR IMPROVEMENT**

### **1. Develop Unified OSD Policy To Serve as the Primary BRAC Program Guidance Document**

A central, organizing OSD policy statement is needed as the primary BRAC program guidance document. It should clearly establish the principal that cleanup and transfer are integral parts of a single process. Particularly useful would be a statement from OSD of the program purpose, goals, objectives, and timelines. The study team recommends the purpose statement set forth the central principles of the BRAC program, i.e., to divest the property expeditiously and with great care to help ensure economic success of the affected communities. The study team also recommends that property transfer, preferably early transfer, not long-term leasing, is the goal, and that the statement address ways to measure progress. Issues such as avoiding recurring O&M costs, and the government's ability to avoid costs for claims arising under CERCLA 120 when the government is named as a co-insured and the insurance company waives the right of subrogation, could also be included.

This policy is an important step to institutionalizing privatization. Establishing cleanup and transfer as an integrated, turnkey operation performed under the auspices of a developer with expertise in environmentally contaminated properties is a significant change from the current BRAC model. It can be applied to existing BRAC sites and to future BRAC rounds.

DoD could implement this policy in the short term by surveying remaining BRAC sites to identify suitable candidates for privatization. Some could be privatized with the existing POM, but others will require adjustments to the POM. The study team recommends the offices of the Deputy Under Secretary of Defense (Environmental Security) and Deputy Under Secretary of Defense (Installations) work with the Services to identify sites which are suitable for privatization and can be implemented within the existing POM, and act to privatize them quickly. Most existing remediation contracts are task oriented. As a result, it is possible to identify logical break points along the restoration pathway at which cleanup execution responsibility could be transferred from government control to the LRA.

The OSD policy could also clarify the following legal interpretation issues:

**a. Remedy Selection**

Policy should clarify the ultimate authority to select the remedy under early transfer and privatized remediation.

**b. Remedy Failure, Changed Environmental Standards, and Newly Discovered Contamination**

Responsibility should be allocated between DoD and the private sector so there is no uncertainty as to who bears the risk and cost associated with environmental remediation under any circumstance. If the remedy selected does not include treatment or removal to unrestricted use, there is an issue with respect to the imposition of institutional or engineering controls as a component of the remedy. Such institutional or engineering controls (collectively, land use controls) require monitoring, enforcement, and notice. These requirements have cost components that should be recognized for the life of the remedy, which in some cases is more than 30 years. The responsibility for these costs may be a component of the development and remediation the private sector undertakes and can be addressed as an amortized cost of the project. Such costs should be recognized by the military Service as a cost avoidance and credit given in the contractual relationship between parties.

## **2. Develop a Cadre of Skilled Real Estate Negotiators Who Share an "End Use" Oriented, Development-Driven Methodology to Property Transfer and Who Use a Common Approach.**

Real estate development and transfer is a serious discipline. Divestiture of property under circumstances as complex and with as many stakeholders as BRAC becomes even more difficult. DoD's mission does not lend itself to skills necessary to accomplish what is largely a commercial real estate development transaction, with many legal and economic nuances. Yet the DoD must come to the negotiating table with the appropriate skill set.

Despite the fact that BRAC is in its fourth round, some of the tools of the trade such as the no-cost EDC, early transfer authority, the Environmental Cooperative Services Agreement, and the use of environmental insurance are all very recent developments. More changes and new tools may be forthcoming. The Services require at least a common grounding in the available tools and their application, particularly the legal, economic, and insurance aspects of negotiating a commercial real estate deal.

The three Services or OSD should collectively develop one curricula that establishes the essential concepts and defines the full range of legal and administrative procedures available to all three Services under an end-use, development-driven model in which cleanup and transfer are treated as an integrated operation. This offers an opportunity to develop common approach among the three Services and to help reconcile the "disconnect" between cleanup and transfer functions. Such training would also help create a common set of expectations for regulators and LRAs that work with more than one Service.

The curriculum should be developed by experts in course development, and use both internal and outside subject matter experts. These would include legal experts, developers, regulators, LRAs, and members of NGOs and environmental not-for-profit communities. It should focus on operating concepts and build on existing training programs that have been developed for DoD and the base closure community. The major issues to be considered for course development include:

- End use, development-driven planning
- Coordinated planning, including specific concerns for DoD, the LRA, regulatory agencies, and other stakeholders
- Use of environmental insurance
- The public participation and comment process

- Deed transfer
- Other legal or administrative tools.

Each of these is explored below.

#### **a. End Use, Development-Driven Planning**

A significant component of the training should focus on end-use planning. This is because site planning in the context of installation management is very different than site planning in the context of commercial real estate development. An accepted, well-defined plan enables the cleanup to be tailored to the appropriate standards and helps to preclude unnecessary changes to those standards over time, which would necessitate further cleanup. This will not eliminate discrepancies between DoD's estimated cost to clean and the LRA's desired end state. LRAs, DoD, environmental activists, other NGOs, and other stakeholders have disagreed on a number of occasions over what constitutes "reasonable" cleanup standards to support the future reuse. They will likely continue to do so in the future, since this is one of the primary issues of any BRAC negotiation. However, with consistent ground rules, there is an objective basis for conducting the negotiations.

#### **b. Coordinated Planning with LRAs, Regulators, and Other Public Stakeholders**

One of the panel authors aptly commented that "...lack of shared understanding of values and the differing agendas of the organizations involved lead to significant delays in BRAC property transfers." The training should also focus on development of a successful coordination process among the military Services, the LRA, and state and federal regulators.

#### **c. Use of Environmental Insurance**

First, it is important that DoD, LRAs, public interest groups, NGOs, and all other stakeholders understand the concept of environmental insurance and how it can be used to manage risk and protect from liability. DoD clarified their position on the use of environmental insurance in a recently released fact sheet. Training should address the different types of insurance, the conditions under which they are used, and their benefits to DoD and other stakeholders.

#### **d. Public Comment Process**

Success in the public participation process is critical, particularly for early transfers in which the public has an opportunity to address the suitability of the property for early transfer prior to approval by the appropriate state governor or federal regulator. With increased moves toward private sector environmental cleanup and early transfer, the public participation process should be strengthened and better focused on securing community acceptance of the procedural and substantive aspects of the remediation.<sup>56</sup> This includes harmonizing the efforts of the RAB and the LRA.

#### **e. The Deed Transfer**

Early Transfer Authority provides the best opportunity for DoD to expedite divestiture of BRAC properties and should be the first option considered to secure deed transfer wherever applicable. However, early transfer has not been the traditional approach employed by DoD, and LRAs have preferred to receive properties that have already been remediated and are ready to transfer to a traditional developer. If early transfer is to work, the Services must be equipped with:

- Knowledge about the costs DoD can avoid by early deed transfer (primarily recurring O&M costs)
- An understanding of the advantages that accrue to the LRA, such as being on the tax rolls and the ability to attract development capital
- A fluency with the concepts of environmental insurance.

#### **f. Other Legal or Administrative Tools**

As the BRAC program continues, more tools will be developed and the ones that exist will be further refined. One of the major purposes of the training should be to keep the Services current of new developments, or improvements in process or knowledge.

### **3. Choose Pilot Sites and Test Concepts of Value Creation and Development Planning**

Success begets success, and there is no better argument to counter critics than success. Against this axiom, the study team recommends selecting a number of pilot sites, preferably at least one from each Service. Using a “tiger team” approach, partner

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<sup>56</sup> Concept Paper-Issue Paper on the Impacts of Privatization on the BRAC Closure Process, March 2000 (Appendix F).

with the LRA, Services, regulators, and other stakeholders to create partnerships and apply innovative cleanup and redevelopment strategies. The notion is that early successes would result in expanded use of these concepts and tools at other sites. The Army's recent use of its "SMART Team" at Fort Ord was enthusiastically received by the LRA. The team brought a wide range of necessary specialized expertise to the site and involved every stakeholder to develop creative solutions.

At least one of the pilot sites should be one that lacks development potential, also known as an "upside down" site. Sites become upside down primarily because their location does not have high market value or is UXO contaminated. These may be prime sites for wilderness areas and may be appropriate for transfer to the Trust for Public Lands, The Nature Conservancy, or another conservation organization. GSA's Property Disposal Office and DoD's Change Management Center of the Office of the Deputy Under Secretary of Defense (Acquisition Reform) are useful assets that could help expedite the implementation.

#### **4. Require Common Program Management Tools**

There are basically two types of management data needed to effectively oversee the program: time and financial.

##### **a. Time**

A single tool should be used by both the cleanup and transfer functions to describe the status of contamination and the estimated time to closure. One of our authors suggests that "... requiring each installation to use a commonly formatted facilities database and program management oversight system will save time and money." This does not preclude either the cleanup or transfer function from having more detailed planning or program management tools, but it does ensure that a single, consistent set of data is available for use by the LRA, the regulators, developers, Congress, and other stakeholders as appropriate. It is not in the best interest of the Services or OSD to give different answers to the same question. A common data set would provide a means to more accurately and completely assess the status and progress of the BRAC program. Data could be tailored to meet specific data needs of various interested parties.

## **b. Financial**

OSD should know the financial impact of early transfer and cleanup privatization by comparing it to the “total cost to clean” they carry on their books. Reducing the cost of the BRAC program is a compelling reason to use early transfer more extensively. An ability to quantify the savings is important to effectively advocate for changes in the funding profile needed in the POM to enable this to occur.

The General Accounting Office (GAO) noted in its *Review of DoD’s 1998 Report on Base Realignment and Closure* that “DoD accounting systems track expenses and disbursements, not savings.” Here they meant long-term O&M savings from closing bases, but DoD does not track total program cost savings from privatization either. DoD should develop a consistent procedure for tracking the total BRAC costs, including cost to clean, and be able to quantify the savings from opportunities to “up front” fund early transfers.

## **5. Create an Inventory or Clearinghouse of Available Military Properties for Marketing Purposes**

Potential purchasers of BRAC sites want to browse a database that contains how much land is available, where is it, who owns it, what condition is it in, and who to contact for more information. This database does not exist today. Such a database would allow developers, conservation organizations, and other potential investors to look for regional opportunities, identify opportunities to bundle properties, and look across Service inventories. Expertise about the kind of information that would help potential purchasers make decisions is an essential input to a project to develop such a database. To date, DoD has left the task of marketing properties to the LRAs. Since DoD pays caretaker costs until the property conveys, it has a financial interest in quick divestiture and in helping marketing efforts.

## **6. Consolidate LRA and RAB Organizations and Funding**

The current situation in which RABs and LRAs both receive funds to perform different aspects of the transfer function is inefficient and creates conflict. In essence, once a BRAC announcement is made, a transformation should occur in terms of the role the RAB should play. This is because under BRAC, cleanup is no longer a stand-alone entity, but is very much a part of a new objective, which is to transfer the property for beneficial reuse. DoD should begin a process through OEA to fund a single organization,

the LRA, one of whose component elements would be members dedicated to the cleanup of the property.

## **7. Partner with LRAs To Maximize the Use of Available Tools To Expedite Property Redevelopment and Transfer and Establish Mutual Expectations of Performance**

LRAs differ widely in their expertise and capacity to undertake these projects. LRAs from small or remote areas with limited development experience can benefit by working with large municipalities with substantial expertise and experience in economic development. It is important to DoD's goals and objectives that LRAs be fully capable partners in the BRAC process. A mechanism by which LRAs can share their experiences would benefit the local communities, the developers, and DoD. Current seminars for LRAs address the mechanics of securing funding and other administrative features of the BRAC program. However, they do not provide the in-depth education and interaction with other LRAs necessary to take action to accelerate the transfer for local reuse. Nor do they provide substantive information about the tools available to establish realistic "highest and best uses" for the properties, or information on large-scale commercial real estate development. For example, many LRAs lack the confidence necessary to take advantage of early transfer opportunities and to make use of environmental insurance to manage risk. DoD, possibly in partnership with the National Association of Installation Developers (NAID) using a mentoring model, should engage the LRAs to establish a program with the goal of producing highly capable LRA partners. Among the issues the education effort should address are:

- *Risk Management.* Consider developing a standard contract and insurance specifications using the assistance of the private sector.
- *Early Transfer Authority.* Provide education regarding the benefits of early transfer to the transferee and the community, in terms of faster development, accelerated tax revenue, and new job creation.
- *No-Cost EDC.* Provide guidance to LRAs concerning changes in conveyance authority and opportunities for investments in the property.
- *Use of Horizontal Developers of Environmentally Contaminated Properties.* Describe how to use a horizontal developer with experience in contaminated properties to create market vision and infrastructure planning and to access private capital.
- *Market Valuation.* Provide a basic understanding of the principals of marketing and value creation. Real estate and business opportunities should



drive the process, not the remediation. LRAs should be able to identify and secure end-users, develop a fully integrated site plan, and work with developers to ensure the product they receive is a site remediated to a level consistent with their redevelopment plan.

- *Land Use Controls.* Develop an understanding of use, options, and impact of land use. LRAs should have available the expertise necessary to involve the community, design appropriate controls, and communicate decisions to the public.

## **8. Develop a Process To Enable a Number of Sites To Be “Bundled” or Transferred to a Non-DoD Owner Under an Umbrella Agreement**

It is important to recognize the value of open space—not only in cases where the land does not appear to have economic development potential but also in cases where the economic development potential is high.

"The DoD's landholdings are an important component of local and regional ecosystems. Because of their often undeveloped status, they have unintentionally become important biotic reserves. The BRAC emphasis on job creation and community reuse is compatible with open space. Many in the environmental community, as well as the developer community, would like to see BRAC properties remain open spaces. In fact, community conservation—with its economic and social benefits—may often advance the optimal realization of BRAC's community focus. Communities across America, faced with suburban sprawl and the related problems of air pollution and water pollution, are increasingly organizing their economic development planning around the concept of “smart growth.” “Smart growth” principles include preservation of parks, greenways, and open spaces along with planned developments so as to create a high quality of life, revitalize cities, boost tourism, safeguard drinking water, and clean the air.”<sup>57</sup>

Organizations such as the Trust for Public Lands or The Nature Conservancy, as not-for-profits, may be eligible for sponsorship by the DOI or other agency for a public benefit conveyance. Some preliminary analysis is required to match the interests of these organizations to available DoD sites, since the kind of data these organizations would need in order to determine their interest is not easily accessible. This reinforces the need for a clearinghouse for the purpose of identifying and marketing available properties.

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<sup>57</sup> Concept Paper-Market, Value Creation, Appendix A-A *Vision for Marketing BRAC Properties* contributed by Trust for Public Lands (Appendix C).

## **B. "BASELINE PLUS" RECOMMENDATIONS**

In addition to the recommendations made above, there are four additional recommendations that DoD may wish to pursue.

### **1. Request a CERCLA Amendment Granting LRA's Immunity From Liability Under Certain Circumstances**

Given the statutory exposure of the LRA and the disproportionate impediment to transfer it creates, a change in legislation would be appropriate. There are precedents for amending CERCLA to exclude certain groups from joint, strict, and several liability in limited circumstances, such as in the case of lenders whose reason for holding indicia of ownership is "... primarily to protect the security interest" in the facility. Lenders who satisfy that criterion are now excluded from owner liability (42 USC 9601 (20)(E) (i)). A similar amendment of CERCLA, to exclude an LRA that acquires title to BRAC property from the definition of "owner," could resolve the risk aversion causing many LRAs to avoid early transfer. Qualifying provisions would be needed, such as the LRA does nothing to cause or contribute to hazardous substances on the property, and does not retain title for any purpose other than to secure a no-cost EDC under early transfer to a private developer pursuant to an approval reuse plan. The LRA would also need to be recognized as an "implementing LRA" by the DoD Office of Economic Adjustment. This measure would facilitate BRAC property transfer without disturbing other aspects of the existing transfer process. Given the existing military CERCLA liability and obligation to indemnify, and the liability of any subsequent owner who acquires the property from the LRA, such an amendment gives no offense to existing public policy.<sup>58</sup> This recommendation is not in the baseline set because other remedies such as closer partnering with DoD and insurance products address this issue. However, a legislative amendment would provide a more obvious, and probably acceptable, solution for LRAs.

### **2. Give LRAs Explicit Timelines for Transfer**

Under the current BRAC process, there is no explicit timeline DoD can use to assess whether or not it is on track to move BRAC properties off the books. Assuming

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<sup>58</sup> Legal and Policy Impediments to Privatized Environmental Cleanup of Base Realignment and Closure Properties (see Appendix G).

DoD had such a timeline, and that it vigorously applied the most efficient practices such as ETA, the process could be expedited even further by requiring LRA performance in the form of timelines for accepting the deed. One of our contributing authors expressed this idea as follows:

"The overarching philosophy of BRAC implementation should be to de-federalize the property as soon as possible - this should be accomplished by making the first year to eighteen months following the date of approval a joint planning exercise between the Military Departments and the LRA. The purpose of this planning exercise should enable the LRA to make a straightforward decision: Does the LRA want to acquire and redevelop the property with some assistance from the Federal government, or does the LRA want the Military Department to dispose of the property to the highest private sector bidder for redevelopment purposes?"<sup>59</sup>

### **3. Request a Legislative Amendment to Allow Conversion of Military Housing To Be Eligible for Transfer Under the No-Cost EDC**

Recognize through clarifying legislation, or an amendment to the zero-cost EDC, to allow conversion of former military housing to be considered as economic recovery. While this clarification may not affect existing housing transfers, it is important to consider this in any legislation for new BRAC rounds.

### **4. Consider Creating a Separate Organization for the Disposal of Military Base Closure Property Outside of the Defense Department**

This new organization would free DoD of the responsibility for providing personnel, transaction costs, O&M costs, personnel costs, cleanup costs, and other management and funding obligations for BRAC. The creation of a new organization would require a legislative amendment to the Federal Property Management and Administrative Services Act of 1949. Establishing an external BRAC organization could be included as legislation authorizing a new BRAC round, or enacted as independent legislation. It could apply to the existing BRAC properties and to new BRAC rounds. The legislation would have to address appropriations, consider the role of the military Service agencies in cleanup, designate the authority to approve no-cost economic development conveyances and Office of Economic Adjustment grants, and establish the continuing responsibility of the military Services with respect to the CERCLA warranty

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<sup>59</sup> Personal communications - Mark W. Frye, KPMG Consulting, LLC.

under 42 USC 9620(h)(3) and the indemnification requirements of Section 330. In addition, the role of the local redevelopment authority, presently entrenched in almost every community affected by base closure, would have to be defined or redefined statutorily. One of the most significant funding issues this change would address is the use of DoD funds, which compete in the POM process against readiness and weapons modernization, in furtherance of broad socio-economic goals related to community development. Development and implementation of transition plans to move from the existing processes in terms of staffing, record keeping, and funding obligations to the new organization would also be necessary.

An alternative presently exists within the GSA Property Disposal Office, an organization that is presently engaged in the disposal of non-BRAC military property. It is possible that the creation of a new organization may bring little benefit beyond that which could be realized by empowering the present property disposal office to perform its historic mission for disposal of federal property. They are located regionally and have expertise in valuation, deed preparation, and real property negotiations. This recommendation would require detailed study to prepare a serious proposal to the Congress.

There are widely differing opinions within DoD regarding the health of the current process. Some hold the view that cleanup and transfer schedules are slipping and cost to complete estimates are growing, for reasons not related to emerging issues such as UXOs and natural resource conservation requirements. Others hold the view that the program is healthy and functioning as intended. Ultimately, it is up to DoD to decide whether its BRAC record satisfies Congress' requirement for effective management, and whether Congress would agree that DoD can effectively manage additional BRAC rounds in the future based on past performance. A detailed proposal to create a new BRAC organization, including specific recommendations for operating principals, organizational structure and other implementation details, is beyond the scope of this study.

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